Supreme Court, U.S.
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No. 98-1428

In The

Supreme Court of the United States

October Term, 1998

HERMAN CORN, Trustee,

Petitioner,

vs.

THE CITY OF LAUDERDALE LAKES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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STATEMENT OF THE CASE AND FACTS

Petitioner has reported a portion of the relevant facts accurately, but has omitted a number of items important for this court's review of the petition. Accordingly, while the facts cited by petitioner are accepted as correct to the extent they are presented, additional facts have been provided for this court's consideration.

A. The Disputed Property

Of the original 261 acres (purchased for less than $5,000 per acre by Herman Corn) annexed into the City of Lauderdale Lakes in 1966, only 8.5 acres are at issue (the Property). (App. B2, *Corn IV*; TR 57, 194).[1] While the majority of Corn's parcel was designated for residential or business development, the City was concerned about Corn's use of the Property and accordingly created a new zoning category, C-1A, for that specific portion of land. (App. D14, *Corn III*). The C-1A classification gave the City the right to control the use of the Property, so that anything developed on that land would first have to be approved by the City Council. (*Id.*)

Corn developed most of the 261 acres in accordance with his original development plan. (App. B2; *Corn IV*). While approximately $100,000 was expended by Corn in preparation of development, no portion of this sum was

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[1] References to the transcript of the trial proceedings before Judge Paine in the United States District Court for the Southern District of Florida (August 12-15, 1991) shall be designated "TR" followed by the appropriate page number.

directed specifically towards development of the Property. (*Id.*) In fact, Corn did not submit a preliminary site plan for the Property until 1976, some ten years after his development expenditures and the annexation of the 261 acres. (*Id.*)

Prior to that time, in 1975, the City retained the services of a planner to create a land use plan and certify its compliance with Broward County's Master Land Use Plan. (D14; *Corn III*). By law, all municipalities within Broward County had to be in compliance with Broward County's Master Plan by November of 1977. (TR 466, 526-527). That planner, Michael Shiff, recommended rezoning of the property in light of its juxtaposition to the residential portions of Corn's land. (*Id.*) The land was not rezoned at that time, however, insofar as no development was pending and it was assumed that the problem would be addressed in the final land use plan. (App. D15; *Corn III*).

In April of 1977, prior to the City Council's initiating any definitive action to rezone the Property, Corn submitted a preliminary site plan which called for the construction of a 67,000 square foot strip shopping center on the front portion of the property and a 900-unit, 103,000 square foot mini-warehouse storage facility on the rear portion of the subject property. (App. E2-3; *Corn v. City of Lauderdale Lakes*, 771 F.Supp. 1557 (S.D.Fla. 1991)).

The preliminary site plans submitted by Corn were reviewed by the City in the ordinary course of government. There were various meetings of the Planning and Zoning Committee wherein Corn's plans for development

were discussed. (TR 98). Ultimately, after various meetings and discussions with Corn, the Planning and Zoning Board eventually recommended on a 2-1 vote that Corn's preliminary site plan, as amended, be approved. (App. D16; *Corn III*).

The matter then came before the City Council for approval of the preliminary site plan, and was discussed at several City Council meetings. (App. D17-36; *Corn III*). Members of the Council and members of the community expressed concerns with the proposed development. (*Id.*). The specific concerns voiced were that the mini-warehouse development would adversely affect the property values of the residences across the canal, that it would destroy the residential character of the neighborhood, that it would adversely affect traffic in their neighborhood, that the peace and quiet of the neighborhood would be destroyed by trucks and vehicles coming to the warehouses in the early morning and late evening, and that it would represent a significant fire hazard. (*Id.*).

On July 12, 1977, approval of Corn's preliminary site plan again came up for vote after having been tabled on several prior occasions. (App. D24-34; *Corn III*). At that meeting, the City passed on first reading Ordinance No. 548 which eliminated, among other things, mini-warehouses as a permissible use under a C-1 zoning classification. (App. J12-17). The City also passed on first reading Ordinance No. 549 which rezoned Corn's land from C-1A to B-3. (App. J18-21). The ordinances were not enacted at that time. Public hearings were held on Ordinances Nos. 548 and 549; they actually became law in September of 1977. (App. D31; *Corn III*).

At a later meeting, on July 19, 1977, the City passed on first reading Ordinance No. 552 which called for a 150-day moratorium on construction on all C-1 property within the City boundaries. (App. D34; *Corn III*). This ordinance became effective on August 9, 1977. (App. J24). At the expiration of the 150-day period, the moratorium was extended for an additional 180-days by Ordinance No. 568, at which time it expired by its own terms. (App. J26-28).

The effect of this legislation was to prevent all construction on the subject property between August 9, 1977 and September 20, 1977. (App. J1-28). After September 20, 1977, Corn could build on the Property in any manner permitted by the B-3 business classification. (TR 234-36, 583; App. B3; *Corn IV*).

B. The State Court Litigation

Corn instituted state court litigation on August 11, 1977, challenging both the validity of Ordinances Nos. 548, 549 and 552 and the City's refusal to approve his preliminary site plans. (App. B4; *Corn IV*). He was ultimately successful, and the City was directed to approve Corn's preliminary site plans upon their resubmission with several modifications. (*Id.*) The basis for the judgment in favor of Corn at the state court level was the judge's finding that Corn had a vested right to the C-1A classification, thus estopping the City from changing that classification or denying Corn usage of the property in accordance with that classification. (App. H17). The City was therefore ordered to approve Corn's plans upon the correction of three deficiencies. (*Id.*)

The judgment of the state trial court was affirmed by Florida's Fourth District Court of Appeal in February 1983. (App. G1-11; 427 So.2d at 244). The appellate court found that although an owner of property typically acquires no vested rights in the continuation of existing zoning under Florida law, Corn had relied in good faith on the zoning and had made substantial change in the nature and contour of the land so as to equitably estop the City from a change in zoning. (App. G8-9).

The mandate of the Fourth District Court of Appeal was issued on March 4, 1983. (App. E5; 771 F.Supp. 1557 (S.D.Fla. 1991)). Corn did not resubmit a preliminary site plan which complied with the directives of the final judgment until October of 1983, a period of seven months following issuance of the mandate. (App. E5; 771 F.Supp. 1557). At that time, Corn was advised that it would be necessary for him to plat the property in order to comply with County, not City, requirements. (*Id.*). Corn then did nothing for a period of another year until he filed a Motion to Enforce Final Judgment in Broward County Circuit Court seeking a ruling that he did not have to comply with any County ordinances which were not in existence in 1977. (App. E4; 771 F.Supp. 1557). The action was unopposed by the City, and Corn obtained the ruling he desired. (TR 597). Despite having prevailed at the state court level, however, Corn elected to forego building the proposed project and instead proceeded with the federal litigation. (App. D3-4; *Corn III*).

C. The Federal Court Litigation

1. The District Court Litigation; *District Corn I*

Corn filed his federal action against the City in 1984, and the case proceeded to trial as a § 1983 action on Corn's claims that the City had taken his property without just compensation. (App. B5; *Corn IV*).[2] The district court found that the City had acted arbitrarily and capriciously and had deprived Corn of a constitutionally protected property interest and therefore had violated his substantive due process rights. (App. E21; 771 F.Supp. 1557 (S.D.Fla. 1991)). The court did not pass on the issue of whether Corn's Fifth Amendment rights had been violated. (App. E23; 771 F.Supp. 1557).

On the question of damages, the court reviewed the evidence presented by Corn and the City in light of the parameters set forth in *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347 (11th Cir. 1990). The court entered judgment in favor of Corn in the amount of $727,875.02. Corn, not satisfied with this amount, appealed the judgment as inadequate. The City cross-appealed the determination that it had violated Corn's Fourteenth Amendment substantive due process rights.

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[2] Corn had dismissed his procedural due process and equal protection claims, so that the only remaining counts at trial were those alleging violations of the just compensation and substantive due process clauses of the Fifth and Fourteenth Amendments, resepctfully.

2. The Eleventh Circuit Appeal; *Corn III*

The Eleventh Circuit opinion held that the trial court erred as a matter of law in its determination that the City had violated Corn's Fourteenth Amendment substantive due process rights and, consequently, reversed the finding of liability (App. D1; *Corn III*). Corn's claim that the trial court had erred in its damage determinations was rendered moot by the reversal. (*Id.*). Remand of the case was limited to the issue of whether Corn could prevail on his Fifth Amendment just compensation claim. (App. D57; *Corn III*).

3. Corn's First Petition for Writ of Certiorari

Corn filed his first Petition with this court in February, 1994, and attacked the Eleventh Circuit's findings with respect to his substantive due process claim. (App. K). This Petition was denied. *Corn v. City of Lauderdale Lakes*, 511 U.S. 1018 (1994).

4. the District Court Litigation; *District Corn II*

Upon remand, the district court addressed Corn's Fifth Amendment just compensation claim for the first time. The district court received additional legal argument from the parties in the form of written status reports, but received no additional evidence beyond that presented in the August 1991 bench trial. (App. C10).

The district court defined the legal issue presented as follows:

> CORN asserts through his just compensation claim that the impact of the CITY's invalid regulations effected a taking of his property interest in either the Subject Property or his proposed development. Therefore, the issue in this case is whether CORN's property (either his interest in the land or in the development project) has been taken without just compensation by virtue of the CITY's ordinances and action affecting each.

(App. C10).

Ultimately, the district court rejected Corn's just compensation claim with respect to both the mini-warehouse project and the Property. With respect to the former, the court found that Corn did not have a vested right to the development of his mini-warehouse project because the City had not issued a permit to Corn upon which he relied to his detriment, nor did Corn have a reasonable expectation in the unfettered development of the Property. (App. C17). The court further found that the ordinances did not effect a taking of the Property because Corn was never deprived of all "economically viable use" of the parcel. (App. C15).

5. The Eleventh Circuit Appeal; *Corn IV*

In *Corn IV*, the Eleventh Circuit disapproved of that portion of the district court's opinion finding that Corn did not have a vested right in the development of his project, noting that "the district court failed to consider the state court's holding that, under Florida law, Corn had acquired certain vested rights in the Project." (App. B16; *Corn IV*).

Despite this, the court affirmed the district court's rejection of Corn's just compensation claim, because regardless of Corn's vested rights in the project, the " 'private property' " subject to the Fifth Amendment's prohibition . . . does not include every single property interest recognized by law." (App. B16, *Corn IV*). Because Corn failed to show that he was deprived of all economically viable use of his Property, the court rejected Corn's claim for the period of time after the moratorium expired, but remanded to the district court for further factual findings as to Corn's just compensation claim during the moratorium period. (App. B21; *Corn IV*).

It was in this appeal, for the first time, that Corn raised the issue of whether the rough proportionality standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), would apply to his case. Specifically, Corn argued that the Eleventh Circuit in *Corn III* failed to apply the appropriate standard of review to his substantive due process claim, in light of this Court's later opinion in *Dolan*. (App. B9; *Corn IV* at n. 3). The Eleventh Circuit summarily dismissed this claim as "meritless, insofar as "*Dolan* did not address the type of substantive due process claim asserted by Corn." (*Id.* at App. B10).

6. Corn's Second Petition for Writ of Certiorari

Corn filed a second Petition for Writ of Certiorari, arguing the precise issues before the Court in his instant petition. (App. L). Notably, in that Petition, Corn again argued that the Eleventh Circuit erred in failing to apply the *Dolan* rough proportionality standard by virtue of its findings in connection with his substantive due process

claim. (App. L34-39). Corn's second Petition was also denied. *Corn v. City of Lauderdale Lakes,* 118 S.Ct. 441 (1997).

7. The District Court Litigation; *District Corn III*

On remand, the district court concluded that Corn was not denied all economically viable use of the Property during the moratorium because the moratorium ordinance was reasonable in its length and there existed economically viable uses of the property pursuant to the B-3 zoning classification. (App. A11). Accordingly, the district court entered final judgment in favor of the City and the individual council members.

8. The Eleventh Circuit Appeal; *Corn V*

In his most recent brief to the Eleventh Circuit, Corn abandoned all of his prior arguments and focused on the factual findings of the district court. (App. M). Specifically, Corn alleged that the City had judicially admitted that the moratorium applied to ban all building on the Property, and was therefore bound by these admissions. (App. M32-35). The Eleventh Circuit affirmed the district court's findings on a per curiam basis. (App. A1-2). None of the issues raised in *District Corn III* or *Corn V* have been addressed in the instant Petition, which is limited solely to the issues previously raised in Corn's prior Petition to this Court.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. THE WRIT SHOULD NOT ISSUE BECAUSE THE CIRCUIT COURT OF APPEALS' DECISIONS DO NOT CONFLICT WITH THE RULINGS OF ANY OTHER COURT AND ARE BASED ON THE APPROPRIATE LEGAL STANDARDS AS PREVIOUSLY ENUNCIATED BY THIS COURT.

A. Introduction

For the third time, petitioner seeks a ruling from this Court that would entitle him to just compensation simply by virtue of the state court's final judgment in his favor. Completely ignoring the Eleventh Circuit's findings with respect to the existence of a "taking," petitioner implies that a state court's equitable finding of vested rights is in the nature of a "physical invasion" of property and therefore a *per se* entitlement to just compensation. This untenable position is directly contrary to the established precedent of this Court, and has not been espoused by any other court in the nation. Insofar as petitioner is simply attacking the lower court's application of the law to the facts, and has not implicated any important federal question or confusion, certiorari should again be denied.

B. Whatever the nature of the "right" alleged by Corn, the courts below properly found that there had been no taking such that just compensation would be required

Throughout this litigation, Corn has consistently attempted to parlay the state court's determination that he had a vested right in the zoning classification of the Property into a *per se* taking within the contemplation of

the Fifth Amendment. This argument has necessarily required that Corn divert attention away from the "taking" aspect of the analysis, and focus on the existence of a constitutionally protected right. This isolated analysis begs the question, as Corn has never shown that he had a constitutional right to build the project he desired which was taken from him in contravention of the dictates of the Fifth Amendment.

In fact, compensable rights under the Fifth Amendment have repeatedly been defined by whether their deprivation denies the owner of all, or substantially all, economically viable use of the property as a whole. As this Court noted in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), a "taking" may not be established simply by showing that a party is denied the ability to exploit a particular property interest that the owner believed was available, calling such a suggestion "quite simply untenable:"

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole. . . .

Id. at 130-31.

The limited number of cases in which the deprivation of a right has automatically transferred into a deprivation of the property itself involve those rights so inherent in

property ownership that their deprivation alone constitutes a taking of the whole property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (right to exclude others); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (same); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (same). In other words, they have involved "traditional" property rights, as opposed to the more peripheral interests asserted by Corn.

Even where such traditional rights are involved, however, there is no compensable Fifth Amendment taking where a balancing of the public interest involved and the property right affected will sustain the state's exercise of its regulatory power. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). To require compensation whenever the economic potential of property is affected "would effectively compel the government to regulate by purchase." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Where, as here, the regulation involved simply limits one portion of the rights retained by the property owner, a finding of a compensable taking is even less compelling. "At least where the owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66.

The Eleventh Circuit properly applied this analysis and found that the zoning ordinances in question did not rise to the level of a compensable taking. Corn was able, after a period of slightly more than a month, to build on the Propery in any manner permitted by the B-3 business classification. (TR 234-36, 583; App. B3; *Corn IV*). He simply chose not to do so, instead pursuing a ruling in state court that he could build the specific project he

initially desired. Corn had already profited substantially on the remainder of the parcel, and stood to profit on any development of the Property within the confines of the B-3 classification. Moreover, despite Corn's allegation that once the state court judgment enforced his "right" to build the mini-warehouse project it was economically infeasible, the district court explicitly found in its first judgment that Corn failed to prove this aspect of his claim. (App. E30; 771 F.Supp. 1557 (S.D.Fla. 1991)).

Corn's requested disposition in this case is logically insupportable. He concedes that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), *citing Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), and *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). On the other hand, he fails to recognize that he never had the expectation of compensation for the right to build his mini-warehouse under state law. Instead, he tries to equate an equitable remedy with a traditional property right under federal Constitutional law, and thereby requests this Court to protect his conferred ability to build a mini-warehouse project in a way never contemplated by any state court.

C. *Dolan v. City of Tigard* still does not apply to a substantive due process claim, and may not be considered with respect to Corn's Fifth Amendment just compensation claim.

Corn once again raises the applicability of the *Dolan v. City of Tigard* rough proportionality standard to this

case, but fails to indicate the context in which he addresses this argument. To the extent that Corn is now attempting to challenge the Eleventh Circuit's just compensation analysis pursuant to the dictates of *Dolan*, he has failed to preserve this issue by raising it below and it should not be considered now. *See Husty v. U.S.*, 282 U.S. 694, 701-702 (1931); *Duignan v. U.S.*, 274 U.S. 195, 198-200; *Tennessee v. Dunlap*, 426 U.S. 312, 316, n. 3 (1976).

Moreover, as consistently argued by the City throughout the pendency of this litigation, *Dolan* simply does not apply to the substantive due process claim advanced by Corn. A substantive due process claim focuses not on the nature of the right allegedly "taken" by the legislative body, but instead turns solely on the propriety of the government's exercise of its police power. *Eide v. Sarasota Co.*, 908 F.2d 716, 721-722 (11th Cir. 1990). In other words, if the plaintiff is able to prove arbitrary and capricious action by the government, it is unnecessary to prove the destruction of value of the property right affected. *Id.*

The "rough proportionality" standard discussed in *Dolan* arises in the context of a Fifth Amendment just compensation claim only, as the required nexus to be established in determining whether the regulation at issue "substantially advances legitimate state interests," as a part of the broader takings analysis. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987). The analysis presupposes the existence of a constitutionally protected right that has been taken from the property owner:

> Without question, had the city simply required petitioner to dedicate a strip of land along

> Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred . . .

Dolan, 512 U.S at 384.

Conversely, *Dolan* distinguished the more traditional land use regulation cases such as the instant one:

> First, they [the land use regulations] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Dolan, 512 U.S. at 385. The problem with Corn's attempts to apply *Dolan* to his case are that he has never adequately shown that he was deprived of a constitutionally protected property interest by the City. Instead, the factual findings of the district court have been that Corn suffered, at most, a limitation on one use of his Property for a short period of time.

Again, Corn desires a logical fallacy to dictate the result in this case. He wishes to separate the state court enforced right to enjoy the previous zoning classification of the Property from the value of the Property itself, and then merge the two once again to recover the full value of the Property by virtue of his isolated loss. Alternatively, he wishes to forego any proof of a loss of value or interest, and simply recover whatever dubious damages

he may on the basis of a rough proportionality standard measured in a vacuum.

This he may not do. Takings law has always required a delicate balance of the competing interests of the property owner and the government, and the lower courts' rulings in this case have appropriately applied the applicable legal standards to the facts of this case. Corn has failed to point to any court that embraces his theory of takings law, and has consequently failed to allege any basis for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: April 27, 1999.

Respectfully submitted,

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APPENDIX K

No. 93-1308

In The

Supreme Court of the United States

OCTOBER TERM, 1993

HERMAN CORN, Trustee,

Petitioner,

vs.

THE CITY OF LAUDERDALE LAKES,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. (a) When a land owner, consistent with the directive of this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), defers pursuing his federal constitutional and civil rights claims in a land use regulation controversy until a final adjudication of his state law-defined rights in property in the appropriate state court is reached, may a Federal Circuit Court of appeals ignore and override final factual findings and legal determinations made in the earlier state court proceedings (as well as the findings of the United States District Court consistent with the earlier final state court judgment) and purport to adjudicate that owner's rights to use his land as if a court of first instance?

(b) When such Circuit Court adjudication conflicts with the state court final judgment and the District Court factual findings, does that adjudication (1) defy this Court's holding in *Williamson County*, (2) violate the rights of that land owner to due process of the law, (3) contravene the constitutional doctrine of comity; (4) ignore federal law relating to full faith and credit (as well

as collateral estoppel and other doctrines of preclusion), and (5) improperly divest the District Court of its function as finder of fact?

2. (a) Where a landowner enjoys a fully vested right to build on his land in a City according to present zoning, confirmed by a final judgment of a state court of competent jurisdiction, which judgment also expressly estops the City from changing the zoning, may the City constitutionally deprive him of that right by a purported change in zoning?

(b) In this situation, when the City – in ostensible review of a site plan consistent with a development plan it has already approved (by state law, a nondiscretionary ministerial review limited to insuring technical site plan compliance) – nonetheless changes the zoning without notice, prehearing investigation or competent supporting evidence, thus depriving the landowner of his vested rights and preventing him from building, does that City deny the landowner due process of law and just compensation?

3. In *Eide v. Sarasota County*, 908 F.2d 716, 720 (9th Cir. 1990), *cert. denied* 498 U.S. 1120 (1991), the Eleventh Circuit first articulated a conceptual construct that there are precisely "four types of challenges [based on allegedly unconstitutional land use regulation] a plaintiff may bring . . . [1] just compensation, [2] due process takings, [3] arbitrary and capricious due process and [4] equal protection claims." This construct was the template of the Circuit Court's opinion below. Is this construct consistent with this Court's rule that challenges to the

constitutionality of land use regulations are to be determined on an ad hoc basis?

4. Does the Eleventh Circuit's explication of substantive due process rights in this case (and other land use cases) correctly explicate the law of this court, or are conflicting interpretations from other Circuit Courts of Appeal, and other state courts, correct?

5. What is the proper measure of damages for a temporary taking of property set aside for a particular authorized and appropriate development if, when development is unlawfully delayed and then finally permitted, the economic window of opportunity for that development has vanished?

PARTIES TO THE PROCEEDINGS

Plaintiff, appellant and cross-appellee, and petitioner is Herman Corn, Trustee, Defendants and respondents are the City of Lauderdale Lakes, a Florida municipal corporation (the City), Howard Craft (Mayor), Alfonso Gereffi, Jerome J. Cohan, Morris Klein, Lyman L. Allen, Louis Greenwald and Harry Kaufman (City Councilmen).

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PETITION FOR WRIT OF CERTIORARI

Herman Corn, Trustee, respectfully seeks Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The August 13, 1993 opinion of the United States Court of Appeals for the Eleventh Circuit is published at 997 F.2d 1369 (11th Cir. 1993), and is reproduced herein – with the subsequent order denying rehearing and a suggestion for hearing en banc – as Petitioner's Appendix A1-60.

That opinion affirmed in part and reversed in part the August 30, 1991 decision of United States District Court for the Southern District of Florida, published at 771 F.Supp. 1557 (S.D. Fla. 1991) and reproduced herein as Petitioner's Appendix B1-32. The subsequent District Court order awarding attorney's fees is at 794 F.Supp. 364 (S.D. Fla. 1992), and reproduced herein as Petitioner's Appendix C1-16.

Since the late 1960's the extended controversy to which these opinions speak has generated eight published opinions and a number of unpublished decisions, by state and federal courts. The remaining published opinions are: 371 So.2d 1111 (Fla. 4th Dist.Ct.App. 1975); 415 So.2d 1270 (Fla. 1982); 427 So.2d 239 (Fla. 4th Dist.Ct.App. 1983), reproduced herein as Petitioner's Appendix D1-11; 816 F.2d 1514 (11th Cir. 1987); and 904 F.2d 585 (11th Cir. 1990). A further order of the Eleventh

Circuit, reversing an award of attorney's fees to petitioner, is at 3 F.3d 442 (11th Cir. 1993). Orders of the Florida Circuit Court in and for Broward County dated January 28, 1970 and May 18, 1971 (with accompanying stipulation) are reproduced herein as Petitioner's Appendix E1-6.

JURISDICTION

This is an action for deprivation of property without due process of law or just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act (42 U.S.C. § 1983). The judgment of the Eleventh Circuit was entered on August 13, 1993. Mr. Corn's petition for rehearing and suggestion for a hearing en banc was denied on October 14, 1993. The federal court action for damages followed a state action culminating in a final judgment invalidating City ordinances 548, 549 and 552 and holding that the City had no discretion to act as it did – holdings recognized by the District Court, yet ignored by the Eleventh Circuit, which found the City's actions valid.

An extension of time within which to file this petition for a writ of certiorari to February 11, 1994, was granted by order of Justice Anthony M. Kennedy, Circuit Justice for the Eleventh Circuit, on December 29, 1993.

This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . "

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . "

City of Lauderdale Lakes ordinances nos. 103, 104, 105, 548, 549, and 552 are reproduced herein as Petitioner's Appendix F1-25.

STATEMENT OF THE CASE

A. Introduction

Twenty-eight years ago, in 1966, the subject 261 acres was annexed to the City of Lauderdale Lakes, to which it was contiguous, by means of an annexation agreement between the City and the property owner, Mr. Corn. The agreement, which included a development plan and site-specific zoning, was memorialized and implemented through City ordinances nos. 103, 104 and 105, enacted at the time of annexation.

Since 1969, controversies having their genesis in the City's efforts to thwart Mr. Corn's rights under the 1966 agreement (notably – but not exclusively – improvement of 8.5 acres of commercial development) have generated eight reported state and federal court decisions (identified *ante*), as well as several unreported decisions. Until the August 13, 1993 Eleventh Circuit Court of Appeals opinion inexplicably returned to square one to decide *de novo* issues previously and finally adjudicated in Florida state courts (as a matter of state law) and reaffirmed repeatedly in federal courts, the decisions have invariably required the City to adhere to its commitments and held (a) that Mr. Corn's rights to build on his land had vested under state law thus becoming protected property rights, (b) that the City lacked discretion to deny approval of the site plan, and (c) that the City was estopped from changing the existing zoning.

B. In 1966, Mr. Corn And The City Enter Into An Annexation Agreement That Included Approval Of A Development Plan And Site-Specific Zoning Consistent With That Development Plan

In 1966, the City and Mr. Corn agreed – after extended negotiations – to the annexation of his 261 acres (the Larger Site) located in an unincorporated area in Broward County, Florida, contiguous to the City. (771 F.Supp. at 1559-60; App. B1-2)[1] As is often the case, an intrinsic part of the annexation agreement was the City's

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[1] Without the cooperation of Mr. Corn, it would have taken an act of the Florida legislature or a formal referendum to enable the City to annex this land. Fla. Stat. Section 171 *et seq.*

approval of a proposed development plan – the *raison d'etre* for the annexation. All this was memorialized in ordinances adopted by the City on July 12, 1966. As the Eleventh Circuit put it in its earlier 1987 Opinion: "The ordinances, respectively, annexed Corn's property [No. 104]; applied a variety of zoning classifications to his land [No. 105]; and allowed Corn to construct mini-warehouses in a portion of his property zoned C-1A [No. 105]." (816 F.2d at 1515)[2] (Ordinance 103 created zoning category C-1A from pre-existing category C-1.)

C. A 1969 State Court Final Judgment Confirms Mr. Corn's Right To Build And Estops The City From Changing The Zoning On The Property

The next event of significance was thus recounted in a subsequent state court opinion:

> In 1969 the city attempted to change the zoning of a portion of appellee's property to prohibit a contemplated project [condominium housing] permitted by the original zoning. Litigation ensued resulting in a judgment holding that the city was estopped from changing the zoning. No appeal was taken from that judgment.

City of Lauderdale Lakes v. Corn, 427 So.2d at 240-41; App. D2. An examination of the January 28, 1970 order and

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[2] The 1966 ordinances did not identify "mini-warehouse" as the precise eventual use, but (in typical zoning terminology) expressly allowed any of several specified commercial and industrial uses, one of which was warehouse. (*See* 997 F.2d at 1371; App. A2-3)

May 18, 1971 final judgment (App. E2, 5), in context, demonstrates that the estoppel reference was to the entire Larger Site, including the 370 foot by 1030 foot 8.5 acres zoned C-1A (the Property) (TR 84).[3]

Between 1966 and 1977, Mr. Corn developed much of the Larger Site consistent with the approved development plan, logically developing the housing first. (771 F.Supp. at 1560; App. B2; TR 81) In reasonable reliance on the earlier approved development plan, he spent in excess of $100,000 toward development of the Property; improvements included waterways which formed a barrier between the Property and the residential parts of the Larger Site. (771 F.Supp. at 1560; App. B2)

D. Defying The State Court Estoppel Order And Reneging On Its Own Agreement, In 1977 The City Council Purports To Deny The Development It Had Approved At The Time Of Annexation And To Rezone The Property

1. The Mini-Warehouse Presents Mr. Corn With An Extraordinary Economic Opportunity

On April 1, 1977, Mr. Corn submitted a preliminary site plan for a 67,000 square foot shopping mall which would front the main adjoining thoroughfare (U.S. 411), and a 103,000 square foot mini-warehouse, separated from the thoroughfare by the mall and from surrounding

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[3] Another effort to renege on its 1966 commitments was launched by the City in 1976 (Circuit Court for the 17th Judicial District of Broward County, Florida case No. 76-7105). This, too, was resolved in Mr. Corn's favor.

residences by the waterways. (771 F.Supp. at 1560; App. B2-3) This site plan was (in the words of the final state court opinion) "in accordance with the development plan submitted to and approved by the City . . . " (427 So.2d at 241; App. D3)

At that time, small warehouses in which individuals might store personal property were just coming into vogue; there was no such facility in Lauderdale Lakes. (TR 3:500) Had the proposal been approved, this development – as subsequent experience of other entrepreneurs demonstrated – would have provided an exceptional business opportunity for Mr. Corn, and also provided a significant convenience for local residents.

2. City Council Actions, Which Overruled Planning And Zoning Board Recommendations, Were Taken Without Advance Notice, Investigations As To Their Appropriateness, Or Supporting Evidence

On May 12, 1977, the City's Planning and Zoning Board recommended approval of Mr. Corn's site plan; on May 27, 1977, it reaffirmed that recommendation. (771 F.Supp. at 1560; App. B3)

When it finally acted on the Corn site plan on July 12, 1977 (having tabled consideration of the matter three times), the City Council introduced and at the same meeting formally enacted two ordinances: Ordinance 548 eliminated warehouses as a permitted C-1A use, and Ordinance 549 rezoned the Property (and *no* other land) to B-3. (771 F.Supp. at 1560; App. B3, F12-21) These ordinances were passed without any advance notice to Mr.

Corn or to the public that any act beyond passing on the pending site plan would be considered. This ambush manifestly violated not only constitutional due process protections and basic fairness, but also the City's own duly enacted procedural standards: Lauderdale Lakes City Code § 25.5.5 requires a ten-day notice and a Planning and Zoning Board hearing on any proposed zoning change before the City Council may act.[4] The Council then denied approval of the Corn site plan as inconsistent with the (newly) created zoning, with no suggestion that the site plan might be modified to make it acceptable. (771 F.Supp. at 1560; App. B3)

Prior to the July 12 hearing, the City had made no effort to investigate mini-warehouses to determine empirically their impact on traffic, noise, etc. (771 F.Supp. at 1560; App. B4; TR 3:500-02) At the hearing, the City Council proposed a moratorium (later formally adopted as Ordinance 552 and extended), ostensibly to study and evaluate the impact of C-1 zone uses, and particularly mini-warehouses. (771 F.Supp. at 1560; App. B3-4, F22-25) The study thus post-dated the zoning change it was supposed to justify.

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[4] At the federal district court trial, former City Mayor Howard Craft conceded that there was no notice, that there was no investigation prior to the hearing ("we never heard of mini-warehouses"), that the City did not consider its 1966 agreements, that this was the only time of which he was aware that the City Council did not follow a Planning and Zoning Board recommendation, and that the rezoning and use deletion was unprecedented in City history. (TR 3:470-71, 494-500, 507-09)

3. City Council Actions Were Taken In Response To Pressure From Neighborhood (NIMBY) Activists

It is undisputed that all of these 1977 City Council acts taken to frustrate Mr. Corn's vested rights were a response to political pressure by neighborhood NIMBY (the often-used acronym for "Not In My Back Yard") activists – ironically for the most part living in the housing. Mr. Corn had developed. (*See, e.g.*, 997 F.2d 1378-84; App. A19-34) These activists appeared in significant number, but – like the City itself – offered no sworn testimony or other cognizable evidence which could support the City's illegal rezoning (which, of course, would have been impermissible anyway in view of the state court judgment).

E. Mr. Corn In The State Courts: Vested Rights, Lack Of Discretion, And Illegality Of City Acts Are Confirmed In A Final Judgment

After these City acts, Mr. Corn sued the City and the City officials identified *ante* in the Circuit Court of the Seventeenth Judicial District in and for Broward County (Case No. 77-12955). (771 F.Supp. at 1561; App. B4) At that time (prior to this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)), Florida categorically forbade money damages as a remedy for unconstitutional land use regulation, no matter how severe the consequences to the landowner. *See Corn*, 816 F.2d at 1517.

Following a trial, the trial court entered its final judgment on October 20, 1978, holding that the waterways and other improvements were made by Mr. Corn in express reliance on the approved development plan, that the City's July 12 actions were taken without notice, and that "Ordinances #548, #549 and #552 were enacted by the City improperly and not in accordance with the requirements of the City Charter." (427 So.2d 241; App. D4) The court specifically held that the City failed "to follow its own notice and procedure requirements (and did not make the requisite showing of compelling health, safety or welfare considerations. (427 So.2d at 242, App. D4) The City Council's action was found to be in direct response to the "demands" of the neighborhood activists "without consideration of the rights of the Plaintiff herein pursuant to the Ordinances of the City of Lauderdale Lakes." And finally, the court expressly held that the City was "estopped to deny Plaintiff's rights in [the original] zoning classification." (427 So.2d at 242; App. D5) and that ordinances 548, 549 and 552 were void and unenforceable. (App. D5) The Court's writ of mandamus directed the City to approve the site plan (upon the making of minor technical adjustments), and to issue the building permit. (427 So.2d 242; App. D5)

The trial court judgment was affirmed in all relevant particulars by the Florida Fourth District Court of Appeal on February 16, 1983.[5] *City of Lauderdale Lakes v. Corn*, 427

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[5] Along the way, a dispute arose as to whether the City would be required to post bond on appeal. This controversy was resolved in a published decision at 415 So.2d 1270 (Fla. 1982). The bonding controversy has no significance in this matter.

So.2d 239 (Fla. 1983) (App. D1-11). The court of appeal held that the City was estopped from changing the zoning (to do so would be "grossly unfair"), and that "no element of discretion remains" in the City to deny the site plan and the approval of the plat on the basis of controlling standards is described as "an administrative act" and "ministerial" (427 So.2d at 243-44; App. D9-10), that under Florida law the City's legislative powers were in no sense impinged (427 So.2d at 244; App. D10), that Mr. Corn's vested rights equitably estopped the City from changing the zoning, and that the City should be "held to the same standards of fair dealing that are applied to other entities." (427 So.2d at 244; App. D9-10) The Florida Court of Appeal issued its mandate on March 4, 1983, at which time the decision became final (771 F.Supp. at 1561; App. B5)[6]

F. Mr. Corn In The Federal Courts: Damages Awarded Based On Constitutional Violations

By the time the illegality of the City's acts of frustration had been definitively adjudicated (1985), Mr. Corn had been deprived of the use of the Property for eight years. The window of economic opportunity for the mini-warehouse project had been lost; other warehouse facilities in the area had preempted Mr. Corn's opportunity.

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[6] In spite of the mandate, the City refused to approve the site plan unless Mr. Corn complied with planning requirements (property platting) that came into existence after July 1977. (771 F.Supp. at 1561; App. B5) On March 26, 1985, the 17th Judicial Circuit Court ordered the City to issue the building permit without platting. (771 F.Supp. at 1562; App. B6)

The market was saturated. the Property remains vacant today.

On January 17, 1984, Mr. Corn filed the underlying case below in the United States District Court for the Southern District of Florida No. 84-6034-CIV, seeking damages for violation of the just compensation, due process and equal protection clauses of the Fifth and Fourteenth Amendments and the Civil Rights Act (42 U.S.C. § 1983). (771 F.Supp. at 1561; App. B5-6)

On October 22, 1985, the district court (Gonzalez, J.) dismissed the action believing it to be unripe under the *Williamson County* test. (771 F.Supp. at 1562; App. B7) In *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514 (11th Cir. 1987), the Eleventh Circuit reversed, and (significantly) acknowledged the final state court ruling: "A final judgment rendered in Corn's favor estopped the City from rezoning the property during the pendency of Corn's ownership of it." *Id.* at 1515. The "property" thus referred to was, again, the entire Larger Site including the Property.[7]

On August 30, 1991, following a four-day nonjury trial, the District Court (Paine, J.) issued its opinion consisting of findings of fact, conclusions of law and extended damages calculations purportedly pursuant to the Eleventh Circuit standard expressed in *Wheeler v. City of Pleasant Grove,* 896 F.2d 1347 (11th Cir. 1990) (*Wheeler*

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[7] Having failed to demonstrate that Mr. Corn's action was unripe, the City flip-flopped and argued that it was overripe. But the district court held that the action was not barred by limitations or res judicata, and the Eleventh Circuit affirmed. *Corn v. City of Lauderdale Lakes,* 904 F.2d 585 (11th Cir. 1990).

IV). The district court's substantive factual findings echoed the state court final judgment, *e.g.*, the passage of critical ordinances on the first reading was without notice and without even an attempt at investigation of the appropriateness of the mini-warehouse use; "the City Council was motivated solely by an irrational desire to thwart CORN's plans." *Corn v. City of Lauderdale Lakes*, 771 F.Supp. at 1569; App. B22.

The District Court presented its conclusions of law in the frame of reference of the *Eide v. Sarasota County* construct. Significant conclusions include: (1) Corn enjoyed vested rights in the pre-July 12, 1977 zoning, and "[t]his issue, having been presented, fully litigated, and resolved in a prior suit between these parties, cannot be relitigated" (771 F.Supp. at 1566; App. B15); (2) Corn enjoyed a protected property interest under Florida law (771 F.Supp. at 1566; App. B15-16); (3) the City acted arbitrarily and capriciously in its actions in July 1977 and thereafter, including its so-called moratorium and report which "seems nothing more than an attempt at *post hoc* rationalization." (771 F.Supp. at 1569; App. B21-22).

G. Twenty-Four Years After The Annexation Agreement And Thirteen Years After Commencement Of Litigation Which Generated Seven Prior Reported Decisions, The Eleventh Circuit Goes Back To Square One, Ignores Prior Factual Determinations By Both State And Federal Courts As Well As Final And Preclusive Legal Findings, And Proceeds As If It Were Writing On A Clean Slate As A Court Of First Instance

This case reached the Eleventh Circuit for the third time following an appeal by Mr. Corn and a cross-appeal

by the City from the District Court's decision. Mr. Corn asserted error in the computation of damages under *Wheeler IV* and in the holding that the individual defendants enjoyed absolute immunity. The City sought to relitigate issues previously and finally decided by the Florida state courts (vested rights) and the Eleventh Circuit (statute of limitations).

The Eleventh Circuit panel, consisting of three judges who had participated in neither of the prior Circuit decisions, wrote as if it were a court of first impression, as if the state court proceedings had never happened or at least as if they had no legal effect, and usurped the District Court's function as trier of fact as well. The Opinion recites the basic state court determinations, but never attempts to reconcile them with its own squarely contrary conclusions, which include a finding that the July 17, 1977 rezoning was proper (no mention is made of the state court estoppel interdiction). (997 F.2d at 1371-72; App. A3-4)[8] Using as its conceptual framework the *Eide v.*

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[8] The Eleventh Circuit apparently saw its mission as not just resolving the discrete controversy presented to it, but also delivering a grand *pronunciamento* with broad impact:

> The district court's error reaches beyond the fisc of one Florida community and the merits of one case . . . More broadly, this case involves questions about how decision-making is allocated between a democratic institution, such as an elected city council, and the federal courts. It involves fundamental issues about the allocation of rights and powers within our constitutional system. (997 F.2d at 1373; App. A7)

The problem with this grandiose language is that the opinion does violence to the precise value it purports to espouse: the proper "allocation of rights and powers within our constitutional system."

Sarasota County template and focusing on substantive due process, the court found that the City had not abused its discretion on July 12, 1977 (997 F.2d at 1373-74, 1386; App. A8, 40) (in contrast to the state court ruling that the City had no discretion as a matter of state law), and that what the City Council did was legislative (997 F.2d 1392-93; App. A54) (in contrast to the state court ruling that it was administrative and ministerial).

The Opinion goes on at length about the neighborhood activist input, in effect acknowledging that it was the basis of the City's decision. (997 F.2d at 1377-87; App. A17-42)

REASONS WHY THE WRIT SHOULD ISSUE

A. The Startling August 13, 1993 Eleventh Circuit Opinion Runs Counter To Monolithic Constitutional, Statutory And Case Law And Threatens To Destabilize The Clearly Defined Mode Of Interaction Between Federal And State Trial And Appellate Courts

1. Striking At The Very Heart Of Federalism, The Eleventh Circuit Ignored Guiding Principles Of Full Faith And Credit, Comity, Preclusion And Due Process Of Law

No concept is more fundamental to the system of federalism than the motion that federal courts must yield to state court determinations of state law, and give full faith and credit to the final judgments of state courts. The City had it exactly right when it wrote in a March 21, 1984 (unsuccessful) Motion to Dismiss:

> In 1980, the Supreme Court of the United States held that issues actually litigated in a state court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the state where judgment is rendered. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411 (1980).

What the City recognized as obvious, the Eleventh Circuit – which must have known better – chose not to recognize at all. Snubbing the Florida court system, the Eleventh Circuit found that the City's illegal acts were valid.

For more than a century, this Court has recognized that federal courts are bound by construction of state law by state courts. *See, e.g., Commercial Bank of Cincinnati v. Buckingham's Executors*, 46 U.S. 5 How. 317, 342-43 (1847). Moreover, under 28 U.S.C. § 1738, judicial proceedings of a state court "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Thus, with a few exceptions not relevant here, matters finally determined in a state court of competent jurisdiction are not open for reexamination in a federal court. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982).

This bedrock rule not only avoids duplicative litigation and enhances the stability of the law; it also promotes the comity between state and federal courts that is the "bulwark of the federal system." *Allen*, 449 U.S. at 95-96; *see also Kremer*, 456 U.S. at 478. The respect to a

state court final adjudication comity dictates is particularly important when a federal court reviews a situation, as here, where a party's rights are grounded in fully adjudicated state law. *See generally Younger v. Harris*, 401 U.S. 37, 44 (1971).

This concept, which speaks to basic due process of law, controls the relationship of federal and state courts in every substantive field. However, because of the procedure prescribed by this Court in *Williamson County* for "ripening" a land use regulation case, intellectual detours by federal courts such as here present have a particular potential for mischief in this area of the law.

2. The Eleventh Circuit Opinion Penalizes Land Owners Seeking Due Process And Just Compensation For Unconstitutional Land Regulation Who Follow The Procedural Dictates Of This Court

Williamson County holds that before a landowner may seek damages in federal court arising out of unconstitutional land regulation, he must first "seek compensation through the procedure the state has provided for doing so . . . [T]he State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.' " *Id.* at 194, 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). Thus, *Williamson County* compels a supplicant to litigate first in state court to "ripen" his cause before seeking damages in federal court. This is exactly what Mr. Corn did here. His reward

at the end of the trial for scrupulously following the procedure this Court prescribed: a Circuit Court of Appeal which simply ignored *at least* these state court findings:

- that Mr. Corn had acquired vested rights under Florida law to develop his property according to the existing zoning and approved 1966 development plan (427 So.2d at 243; App. D8-9);
- that the City lacked discretion under Florida law to change that zoning or to deny approval of the site plan (427 So.2d at 242-44; App. D6-10);
- that the City was expressly estopped by a final judgment from a Florida court of competent jurisdiction from changing the zoning (427 So.2d at 243; App. D9); and
- that ordinances nos. 548, 549 and 552 were void and unenforceable. (427 So.2d at 241-42; App. D5)

These final determinations of state law would have manifestly received collateral estoppel effect under Florida law. *Mobil Oil Corp. v. Shevin*, 354 So.2d 372, 374 (Fla. 1977); *R.D.J. Enters. Inc. v. Media Bank*, 600 So.2d 1229 (Fla. App. 1992). Under section 1738, they bind federal courts as well. *Allen*, 449 U.S. at 96 (issue preclusion or collateral estoppel applies in a § 1983 action); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984) (claim preclusion or res judicata applies in a § 1983 action).

Had the Eleventh Circuit been faithful to its comity obligations, it could not have reached the result it did.

While the District Court understood for the most part the limitations the prior proceedings placed on it,[9] the Eleventh Circuit did not. In view of the preclusive finding that Mr. Corn's rights were vested and the 1977 ordinances which forced the Property into idleness were invalid, liability for a temporary taking was established. *See Lucas v. South Carolina Coastal Comm'n*, 505 U.S. ___, 120 L.Ed.2d 798 (1992). The Eleventh Circuit had but one legitimate qustion [sic] to decide: how much monetary damages should be awarded to Mr. Corn. If the August 13 opinion is followed, landowners will be required to litigate liability in state court, only to face the pointless and duplicative task of doing so all over again in federal court. The horrendous extra burden this will place on litigants and the judiciary cannot be what this Court intended when it promulgated *Williamson County*.

3. The Eleventh Circuit Rode Roughshod Over District Court Factual Findings (Including Findings As To Motive And Intent) In Contravention Of The Well-Defined Allocation Of Power And Duties Between Federal Trial And Appellate Courts

This caption needs little elaboration. The Eleventh Circuit simply ignored findings of fact made by the District Court, which heard the evidence and observed the

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[9] The District Court made an "independent review of the evidence" as to whether Mr. Corn's substantive due process rights were violated, reaching the same result as the state courts. (771 F.Supp. at 1569; App. B21)

witnesses.[10] In its result-driven analysis, the Eleventh Circuit badly overreached, divesting the District Court of its allocated fact-finding powers.

B. In Contravention Of Mr. Corn's Vested Rights And An Established Body Of Constitutional Law, The 1977 City Council Made Decisions It Was Not Empowered To Make, Violating Its Own Required Procedures, And Made Them On Impermissible Grounds

1. By 1977, Mr. Corn's Rights To Build The Mall And Mini-Warehouse Were Vested; The City Was Bound By A State Court Final Judgment Estopping It From Changing The Zoning And Divesting It Of Discretion To Deny The Site Plan

A brief look at the City actions the Eleventh Circuit upheld demonstrates how far it wandered afield. At the time he went into the July 12, 1977 hearing, Mr. Corn enjoyed:

- a development plan approved by the City pursuant to the agreed annexation which entitled him to develop the mini-warehouse project;

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[10] For example, the District Court found that the City was "motivated solely by an irrational desire to thwart CORN's plans." (771 F.Supp. at 1569; App. B22) But it is axiomatic that findings as to motive and intent are factual, and uniquely within the purview of the trial court. *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982). The testimony of Mayor Howard Craft (*see* n.4, *ante*) is alone sufficient to sustain this finding.

- vested rights under Florida law to so develop;[11]
- a state court final judgment that estopped the City from changing the zoning on the Property; and
- a City Council empowered only to conduct an administrative-ministerial review.

By all reason this should have made the site plan hearing a technical review of details. But the reality was otherwise.

2. Mr. Corn Was Ambushed By The No-Investigation, No-Notice, No-Due Process Extralegal Purported Zoning Change

In enacting the 1977 ordinances with no advance notice, the City not only ignored its own charter requirements, but also ignored the standards which "seem to be universally prescribed in all systems of law established

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[11] The definition of property interests and the determination whether a particular interest is a vested property right to which the protections of the United States Constitution attach are, of course, quintessentially questions of state law. *Preseault v. I.C.C.*, 494 U.S. 1 (1990); *Williamson County*, 473 U.S. at 184; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 973 (1982). As to Florida law, *see Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10, 16-17 (Fla. 1976). A particularly insightful explication of the meaning of vested rights (rights "which cannot be interfered with or taken away without just comprensation") is found in *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1197 (8th Cir. 1983).

by civilized countries."[12] *Twining v. New Jersey*, 211 U.S. 78, 110-11 (1908). Mr. Corn was blindsided: he had no real opportunity to prepare to be heard on the subject matter of any of the ordinances. And the curiously perverse procedure the City adopted of enacting the ordinance first and thereafter undertaking a study to justify the ordinance, not only (again) violated the City charter, but was disturbingly reminiscent of the command of the Queen of Hearts: "Sentence first – verdict afterwards." Carroll, *Alice in Wonderland*, Ch. 12.

As Mayor Craft testified (*see* p. 11 n.4, *ante*), the 1977 City Council paid no attention whatsoever to the solemn commitments the City made to Mr. Corn in 1966. The whole scenario could serve as a textbook prototype of what this Court has defined as constitutionally impermissible: frustration of "investment-backed profit expectations." *Williamson County*, 473 U.S. at 200.

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[12] The denial of notice and hearing, and the failure of the City to follow fair procedures – or even its own procedures – are matters traditionally considered under the rubric of procedural due process. But there is no conceptual reason they cannot be part of a pattern of arbitrary and capricious behavior that implicates substantive due process as well (the procedural due process claim for relief in this case was dismissed before the district court resolution). There is no clear delineation: "[T]he line between "procedure" and "substance" is hazy in the setting of the regulation of land uses." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988). "Where, as here, the plaintiff alleges the denial of the process consists of an official's arbitrary action, a claim for violation of substantive due process is indistinguishable from a claim for violation of procedural due process." *Sierra Lake Reserve v. City of Rocklis*, 938 F.2d 951, 957 (9th Cir. 1991), *cert. granted and judgment vacated*, 113 S.Ct. 31 (1992), *on remand*, 987 F.2d 662 (1992).

The state court holding that the 1977 zoning change was illegal came as no surprise. Florida law unequivocally holds that when a city purports to change a zoning ordinance to defeat a permit application and site plan that would be approved under existing zoning, that City acts "arbitrarily, capriciously, discriminatorily and illegally." *City of Margate v. Amoco Oil Co.*, 546 So.2d 1091, 1093-94 (Fla. App. 1989).

3. Inappropriate Deference To Neighborhood (NIMBY) Activists At The Expense Of Constitutional Rights – The Basis Of The City's 1977 Actions Here – Is An Increasing And Critical Problem Needing Address By This Court

In its 1993 opinion, the Eleventh Circuit called *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), a "red cow," *i.e.*, a precise precedent. (997 F.2d at 1390 & n.2; App. A48) (It is not even close.[13] But the case at bench has one significant fact in common with

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[13] In *Greenbriar*, the landowner sought a change of zoning to enable a desired project as to which he had no right, vested or otherwise [*id.* at 1572, 1581]; here, Mr. Corn sought only to build according to a vested right under *existing* zoning. In *Greenbriar*, the City won below, thus getting the benefit of a favorable review standard; that should have inured to Mr. Corn here. The real "red cows" are *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Southern Co-Op Development Fund v. Driggers*, 696 F.2d 1347 (11th Cir. 1983), *cert. denied*, 463 U.S. 1208 (1983); and *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. Unit B 1981) (*Wheeler I*). In each of these comparable vested rights-substantive due process appeals, the landowner (whose position was not as strong as Mr. Corn's here) prevailed.

Greenbriar: in both cases public officials abdicated their governmental powers in favor of NIMBY activists.[14]

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[14] The August 13 Opinion notes that "[i]n *Greenbriar* . . . the City's decision was based upon "political pressure" from citizen voters who turned out as a crowd to oppose the development." (997 F.2d at 1389; A46). This language from *Greenbriar* (881 F.2d at 1579) is quoted with approval:

> [N]othing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operation of democratic . . . government, operations which are permeated by pressures from special interests . . . The fact "that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws" . . . does not state a claim of denial of substantive due process." (997 F.2d at 1389; A47)

This harsh standard has drawn critical comment from within the Eleventh Circuit. In an acerbic (but finally obedient) opinion, one district judge wrote that *Greenbriar* "clearly stands for the proposition that elected officials who vote on zoning requests can act for purely political reasons, because partisan, political decision-making, even by unknowledgeable, close-minded politicians . . . is automatically deemed rational and, therefore, cannot be arbitrary and capricious unless it is the product of corruption . . . The only limitation appears to be that there be no forty pieces of silver . . . Anything goes! . . . [T]he *Greenbriar* answer . . . simply says, 'THAT's politics!'." *Church of Jesus Christ of Latter-Day Saints v. Jefferson County*, 721 F.Supp. 1212, 1214-16 (N.D. Ala. 1989) (emphasis in original).

Something is disturbingly amiss in the Southeast United States: obeisance to NIMBY activists is proliferating like kudzu.

There is virtually no dispute on this point:[15] the only question is as to the propriety of the abdication.[16]

This problem may be more severe in the Eleventh Circuit than elsewhere, but it approaches crisis proportions throughout the country. It is the subject of a 1990 presidential report by the Advisory Committee on Regulatory Barriers to Affordable Housing, *"Not In My Back Yard" Removing Barriers to Affordable Housing*. Slogans tend to be highminded; the reality behind the acronyms is often no more than social or economic self-aggrandizement. There is every incentive in this situation for public officials – often motivated by nothing more exalted than a desire to perpetuate themselves in office – to count noses and pander. If a court overturns a decision (and they

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[15] The concurring opinion of Judge Hatchett (997 F.2d at 1393-94; App. A57-58) is revealing. It makes but one point, and makes it repeatedly: "nothing in the opinion should be interpreted as creating a new rule of law that developers will always be unsuccessful in stating a substantive due process claim when a large number of citizens oppose a land use proposal"; "we do not hold that local governments will always prevail in defending substantive due process claims whenever their zoning decision follows public meetings where citizens express general welfare concerns" (997 F.2d at 1393, 1394; App. A57-58). Why was this concurrence necessary? Precisely because the majority opinion, fairly read, seems to do precisely what the Judge Hatchett said it did not do; make NIMBY protestation, no matter how self-serving or irrational, a sufficient basis – *in itself, without more* – for land use decisions.

[16] To bolster its conclusion that the NIMBY opposition was a good and sufficient basis for the 1977 City acts, the Eleventh Circuit called the unsworn opinions and idiosyncratic concerns of the activists "evidence" and "facts." (997 F.2d at 1386; App. A38-39)

rarely do), the officials are personally absolved of responsibility. In the process, constitutional safeguards take the hindmost.

The most instructive precedent of this Court is *Washington ex. rel. Seattle Trust Title & Trust Co. v. Roberge*, 278 U.S. 116 (1928). Striking down a zoning ordinance that made operation of a "philanthropic home for children or for old people" contingent on approval of two-thirds of neighbors living within a specified radius as an invalid delegation of power and a violation of the due process clause (*id.* at 118), this Court held (*id.* at 121):

> The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution.

What happened below is uncomfortably close to *Roberge* redux, only worse: it lacks *Roberge's* statutory framework.[17]

Mr. Corn does not suggest that barriers be placed before citizens wishing to appear before a governmental body and thus directly participate in the political process. This is a cherished American tradition; the right to be heard – even when speaking from misinformation or self-

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[17] Also instructive is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (a city may not avoid the strictures of the Constitution "by deferring to the wishes or objections of some fraction of the body politic"). *See also Marks v. City of Chesapeake*, 883 F.2d 308, 310-12 (4th Cir. 1989). Florida state law is consistent that public opposition is not a sufficient basis for zoning decision. *Bailey v. City of St. Augustine Beach*, 538 So.2d 50, 52 (Fla. App. 1989); *BML Investments Inc. v. City of Casselberry*, 476 So.2d 713 (Fla. App. 1985).

interest – must be preserved. But this Court needs to remind regulators that there is a "sanity check"; officials must not yield to public pressure when constitutional rights are at risk.

C. The Eleventh Circuit *Eide* Construct, Central To the [sic] Disposition Of This Case Below, Is Inconsistent With The Teachings Of This Court, And Requires Litigants Challenging Land Use Regulations To Operate Under A Set Of Rules Different From Those In Other Circuits

In *Eide v. Sarasota County*, 908 F.2d 716 (9th Cir. 1990), the Eleventh Circuit unveiled a construct for resolution of constitutional challenges to land use regulations. The Court noted that the required threshold step was "determining what type of claim Eide is making," and then pronounced that there were precisely "four types of challenges [based on allegedly unconstitutional land use regulation] a plaintiff may bring . . . [1] just compensation, [2] due process takings, [3] arbitrary and capricious due process and [4] equal protection claims." *Id.* at 720.

Since *Eide*, this construct has been used pervasively in the Eleventh Circuit, at both trial and appellate levels. *See, e.g., Rearhard v. Lee County*, 968 F.2d 1131, 1134-35 (11th Cir. 1992). It was the matrix for the decision below; the construct is repeated at 997 F.2d 1373-74 (App. A 7-9).[18]

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[18] The Eleventh Circuit construct has been referred to, to Mr. Corn's knowledge, in only one other circuit: it is mentioned as unhelpful in a district court opinion (*Pearson v. City of Grand*

This Court has, of course, adopted its own quite different approach:

> [W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." (citations)
>
> In engaging in these essentially ad hoc, factual inquiries . . .

Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978).[19]

This Court's ad hoc, fact-focused construct posits an almost infinite variety of situations; the Eleventh Circuit posits but four rigid categories. The problem with the kind of categorization exercise the Eleventh Circuit attempted, however intellectually nimble in the abstract,

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Blanc, 756 F.Supp 314, 318 (E.D. Mich. 1991)), and as helpful in the Sixth Circuit affirmance of that opinion (*Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215-16 (6th Cir. 1992)).

[19] *See also Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2290 (1993); *Lucas*, 112 S.Ct. at 2893; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986). As this Court emphasized in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), while ad hoc considerations control these cases, "the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance."

is that categorization inevitably means exclusion.[20] There is, for example, no really appropriate place in the Eleventh Circuit template for vested rights. This fact worked adversely to Mr. Corn in this case; the construct had no capacity to recognize the superior status that state-court adjudicated vested property rights enjoy in the hierarchy of protected interests.

The *Eide* construct does not express the test this Court has established. It imposed upon Mr. Corn, and will impose upon future Eleventh Circuit landowner-litigants, a straight-jacket landowners in other circuits will escape.

D. This Case Presents A Vehicle For Resolving The Significant Conflict Which Exists Between The Several Circuits (And Between Federal And State Courts) As To The Breadth Of Substantive Due Process Guarantees In Land Use Cases

The substantive due process analysis in the August 13 opinion (997 F.2d at 1374-76; App. A9-13) did violence to logic and precedent in a number of ways.[21] *First*, it ignored Eleventh Circuit precedent that where a City act

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[20] In *Eide*, 908 F.2d at 724-25 n.15, the Eleventh Circuit gently chided this Court for failing to make clear into which of the four available pigeonholes one of its cases (*Pennell v. City of San Jose*, 485 U.S. 1 (1988)) fits.

[21] The district court found liability under substantive due process. Since the measure of damages under this theory is the same as under a takings claim (*Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 n.3 (11th Cir. 1987) (*Wheeler III*)) the district court did not try the inverse condemnation claim; it was remanded by the Circuit. (997 F.2d at 1393 & n.3; App. A56-57)

is *illegal*, as were the zoning change and site plan denial here, such act as a matter of law cannot "bear a substantial relation to the public health, safety, morals or general welfare." (997 F.2d at 1374; App. A10) *See, e.g., AA Profiles*, 850 F.2d at 1488. *Second*, one of the prongs of the test applied was "whether the deprivation . . . is the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation." (997 F. 2d at 1374; App. A9) This suggests that the court misperceived what was before it; a constitutional land use regulation claim which implicates the exercise of the state's inherent police power and a self-executing Constitutional provision, and does not sound in tort. *See, e.g., Reardon v. San Francisco*, 66 Cal. 492, 505 (1885).[22] *Third*, the Eleventh Circuit failed to factor in the vested rights and preclusive ruling aspects of the case. The fact significant to this Court is that the analysis bore scant resemblance to the substantive due process analysis this case would have received in other circuits or state courts throughout the land.

The Sixth Circuit opinion in *Pearson v. City of Grand Blanc* contains a circuit-by-circuit review of substantive due process land use law. (961 F.2d at 1217-20) According to *Pearson*, the Third and Fourth Circuits are somewhat more sensitive than others to landowner rights, the Ninth and Eleventh Circuits are essentially congruent in

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[22] "[I]t is not a tort for government to govern . . . " (*Dalehite v. United States*, 346 U.S. 15, 57 (1952) – even if that governance takes private property. Whether just compensation is payable is "an entirely separate question." *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979).

approach (open to some question in view of the Eleventh Circuit construct), the Eight [sic] Circuit decisions are in such internal disorder that there is no ascertainable circuit position . . . and so on. The Sixth Circuit's own test is extremely draconian; it will interfere in zoning abuse cases only when such abuse is so extreme that it "shocks the conscience." *Id.* at 1222. With respect, the "shocks the conscience" standard shocks the conscience; the right of a citizen to receive rights guaranteed by the Constitution should not be captive to the subjective emotional response of a jurist.

Pearson also stresses that federal courts are typically much more deferential to public entities in substantive due process challenges than state courts. *Id.* at 1221-24. There seems to be little rational basis for this dichotomized hierarchy of protection, particularly when state courts are often called on to determine and enforce rights under the United States constitution.[23] The *Pearson* court concluded:

> We wish it were within our power to harmonize these decisions, but the conflicts among circuits are too great. *Harmony will have to await action by the Supreme Court. Id.* at 1220 n.45. (Emphasis added)

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[23] *Pearson* suggests that a linchpin of the various analyses is whether the critical decision is legislative (high deference) or quasi-judicial, administrative, or ministerial (less deference). In the case at bench, of course, the Eleventh Circuit somehow saw the challenged acts as legislative, even though the preclusive state court rulings held them to be administrative and ministerial. No reason appears why a federal court should be telling a state how to categorize its own governmental decisions.

The quantum of federal constitutional protection a citizen enjoys should not depend on the serendipity accident of geographical location. The case at bench extends as opportunity to cure the pervasive conflicts and conceptual confusion in the application of substantive due process law to land use cases.

E. This Court's Guidance Is Needed In Resolution Of The Recurring Question Of The Proper Measure Of Damages In A Land Use Case Where An Economic Opportunity Is lost Because Of A Temporary Taking

In 1977, when Mr. Corn went before the City, he was on the brink of an exceptional economic opportunity: ownership of the first mini-warehouse in the Lauderdale Lakes area. When the dust settled in 1985, and he was legally empowered to pursue that project, the window of opportunity was gone: the relevant market was saturated.[24]

In context, the related issues are: Where lawless government acts cause the economic feasibility of a contemplated project to be lost forever, does the temporary taking become permanent (Mr. Corn's position below)? If

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[24] As noted *ante*, this question was presented to but not addressed by the Eleventh Circuit, since unaccountably it returned to square one on the liability issue. The District Court spoke to the proper measure of damages for the partial and temporary taking (771 F.Supp. at 1570-71; App. B23-26), and Mr. Corn presented the issue to the Eleventh Circuit at pp. 40-43 of his Opening Brief, and p. 15 of his Brief of Cross-Appellee and Reply Brief For Appellant (question is what damages apply "[i]f by the time the regulations which effected a temporary taking are set aside the confiscated project is no longer feasible)."

not, how may compensation reflect not only the temporary loss of use but the fact that the land may be worth but a fraction of what it was prior to the regulatory freeze? Is an owner required somehow to attempt to mitigate damages by seeking to build consistent with the less desirable zone classification he is challenging (which would render any ultimate vindication pyrrhic)? And where the owner is freed to build part of an integrated project (here the mall) before he is able to develop the remainder, must be proceed with such partial development even though piecemeal construction is economically contra-indicated?

There is some law from lower courts that is helpful, typically only by analogy. *See, e.g., Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977). But this Court has not spoken to these recurring problems. Its address would insure fairness and uniformity, and effect a significant saving of time and judicial resources.

CONCLUSION

This case offers almost an embarrassment of certiorari-worthy issues. They engage in very fabric of federal law and speak to the relationships – largely grounded in the United States Constitution – on which that system is based: the relationship of federal courts to state courts, of trial courts to appellate courts, of the judiciary to local governments and of the several institutions of governance to the rights secured in the constitution. The Eleventh Circuit ignored the principles underlying these relationships and ran roughshod over the rules that embody those principles.

The individual right at the center of this controversy is the "personal right in property . . . That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). This Court has reaffirmed the primacy of that right this term, identifying as "an essential principle" the fact that "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S.Ct. 492, 505 (1993). Regulating authorities and reviewing courts need to be reminded to stop trifling with the constitutional rights of citizens in the name of political expediency.

It has been almost a decade since this court spoke in *Williamson County*. This petition offers an appropriate vehicle to resolve the recurring problems raised in its aftermath.

DATED: February 11, 1994.

Respectfully submitted,

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APPENDIX L
QUESTIONS PRESENTED

1. Does a landowner have a constitutionally protected property interest in a vested right to build a specific project on land, which pursuant to state law the city is estopped from thwarting, so that the landowner is entitled to just compensation pursuant to the Fifth Amendment for the city's confiscation of his vested right?

2(a). Does a landowner who has vested rights to develop a specific project suffer the loss of all use of his land during the pendency of state litigation through which the landowner establishes his vested rights and the city's obligation to approve the project?

2(b). Even if the land can be developed for alternate uses, must the landowner develop his land for any such use during the pendency of the state litigation and thereby moot his state claim, abandon his vested right and forfeit his constitutional right to obtain just compensation for the confiscation of his project?

3(a). Does a city commit a compensable taking of property pursuant to the Fifth Amendment when it wrongfully prevents development of land through invalid regulation comprised of the enforcement of invalid ordinances and the administrative rejection of a site plan it lacks discretion to deny, since the city's invalid action can never substantially advance any legitimate state interest?

3(b). Does the rough proportionality analysis of *Dolan v. City of Tigard*, 512 U.S 374 (1994), apply to a city's administrative exaction of a landowner's constitutionally

protected vested right to build a specific project as a condition to the landowner's development of his land?

PARTIES TO THE PROCEEDING

Plaintiff, Appellant and Petitioner is Herman Corn, Trustee ("Corn").

Defendants and Respondents are the City of Lauderdale Lakes, a Florida municipal corporation (the "City"), Howard Craft ("Mayor"), Alfonso Gereffi, Jerome J. Cohan, Morris Klein, Lyman L. Allen, Louis Greenwald and Harry Kaufman (collectively the "City Councilmen").

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OPINIONS BELOW

This Petition seeks review of the following opinions issued by the United States Court of appeals for the Eleventh Circuit:

1. *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066 (11th Cir. 1996) (*"Corn IV"*), and the Order Denying Rehearing and a Suggestion for Rehearing En Banc, included as Petitioner's Appendix A.

Corn IV affirmed in part, vacated and remanded in part the Findings of Fact and conclusions of Law Upon Remand of the United States District Court for the Southern District of Florida, ("Second final Judgment"), included as Petitioner's Appendix B.

2. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993), *cert. denied*, 511 U.S. 1018 (1994) (*"Corn III"*), and the subsequent Order Denying Rehearing and a Suggestion for Rehearing En Banc, included as Petitioner's Appendix C.

Corn III affirmed in part and reversed in part the August 30, 1991 decision of the United States District

Court for the Southern District of Florida, published at 771 F.Supp. 1557 (S.D. Fla. 1991) (the "First Final Judgment"), included as Petitioner's Appendix D.

In addition to the opinions identified above, this controversy has generated the following relevant published opinions and unpublished decisions, by state and federal courts:

a. *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990) (*"Corn II"*).

b. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) (*"Corn I"*).

c. *Corn v. City of Lauderdale Lakes*, 3 F.3d 442 (11th Cir. 1993).

d. *Corn v. City of Lauderdale Lakes*, 415 So.2d 1270 (Fla. 1982).

e. *Corn v. City of Lauderdale Lakes*, 427 So.2d 239 (Fla. 4th DCA 1983) (*"State Corn I"*), included as Petitioner's Appendix G.

f. *Corn v. City of Lauderdale Lakes*, 371 So.2d 1111 (Fla. 4th DCA 1975).

g. *Corn v. City of Lauderdale Lakes*, Case No. 77-12955, Broward County Circuit Court, Final Judgment ("State Court Final Judgment"), included as Petitioner's Appendix G.

h. *Corn v. City of Lauderdale Lakes*, Case No. 69-6229, Broward County Circuit Court, Orders on Summary Judgment, included as Petitioner's Appendix H.

JURISDICTION

This is an action for just compensation for the administrative taking of real property and the vested right to build a specific project without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act (42 U.S.C. § 1983). The judgments of the Eleventh Circuit were entered as follows:

1. *Corn IV* was entered on September 23, 1996. Corn's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 20, 1997.

2. *Corn III* was entered on August 13, 1993. Corn's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on October 14, 1993.

An extension of time within which to file this Petition for Writ of Certiorari to August 15, 1997, was granted by order of Justice Anthony M. Kennedy, Circuit Justice for the Eleventh Circuit, on June 6, 1997.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> " . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . "

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinances, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . "

City of Lauderdale Lakes ordinances nos. 103, 104, 105, 548, 549, 552, and 568 are reproduced as Petitioner's Appendix I.

STATEMENT OF THE CASE

A. Introduction

This case presents takings issues which this Court has identified without resolving, which important questions have been incorrectly decided by the Eleventh Circuit.

Through this litigation Corn is seeking just compensation for the City's administrative confiscation of his vested right to develop a mini-warehouse/self-storage facility with an attendant strip shopping center (the "Project"), on an 8½ acre parcel of property (the "Property"). The City wrongfully prevented Corn from developing the

Project by rejecting Corn's preliminary site plan (the "Site Plan"), after illegally enacting ordinances rezoning and placing a moratorium on development of the Property and eliminating warehouses as an authorized use of land in the City. Before seeking just compensation in federal court Corn had successfully sued the City in state court, establishing that the offending ordinances were improperly enacted and that the City was estopped from enforcing the ordinances against the Property because Corn had a vested right to develop the Project. The state court found that the City lacked discretion and was required to approve the Site Plan and issue a building permit for the Project.

The state court litigation lasted almost eight years. Throughout this time the wrongful rejection of the Site Plan remained in effect, preventing Corn from developing the Project, thereby depriving him of all economically viable use of both his vested right to develop the Project and the Property.

Through the federal litigation Corn has unsuccessfully sought the recovery of just compensation for the confiscation of his constitutionally protected property interest in the Project and the loss of his use of his Property.

B. Pre-Litigation Background

The Property was part of a 261 acre tract (the "Tract"), acquired by Corn in 1966, when the Tract was located in unincorporated Broward County, and zoned

for agricultural use. (App. G-2, State Court Final Judgment[1]; App. D-1, First Final Judgment). Corn agreed to the annexation of the Tract into the City[2] in return for which the City approved Corn's development plan for the Tract. (App. A-2, *Corn IV*). Accordingly, ordinances were simultaneously enacted annexing the Tract into the City (Ordinance 104), zoning the property comprising the Tract for residential, commercial and industrial use, in accordance with Corn's development plan (Ordinance 105), and creating zoning category C-1A, an industrial zone which allowed warehouses, to apply to the Property (Ordinance 103). (App. D-2, First Final Judgment; App. A-2, *Corn IV*).

Corn expended in excess of $100,000 in reliance upon the City's annexation and zoning of the Property, developing the Property for C-1A use. (App. G-3, State Court Final Judgment; App. D-2, First Final Judgment). The Property fronted on a main thoroughfare on the east and was bounded by a canal on the south. (App. D-2, First Final Judgment). Corn constructed canals on the western and northern borders of the Property to create a buffer between the Property and the proposed residential areas, thereby fixing the dimensions of the Property at 370 feet wide, and 1,030 feet deep. (*Id.*).

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[1] The parties were collaterally estopped from relitigating the facts conclusively established in the State Court Final Judgment. *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

[2] Without Corn's consent the City would have had to hold a formal referendum or secure an act of the Florida legislature to annex the Tract. Fla.Stat., Ch. 171, et seq.

Corn thereafter proceeded to develop the Tract in accordance with his original development plans and the zoning established by Ordinance 105, first building single family homes and condominiums. (App. G-2, State Court Final Judgment; App. D-2, First Final Judgment; App. A-2, *Corn IV*). In 1969 the City attempted to change the zoning of a portion of the Tract. (App. G-2-3, State Court Final Judgment). Litigation ensued resulting in a judgment holding that the City was estopped from changing the zoning. (App. F-2, *State Corn I*). The ruling of estoppel to change zoning was applicable to the entire Tract. (App. H-2, Order Granting Summary Judgment).

On April 1, 1977, Corn submitted the Site Plan to the City. (App. D-23, First Final Judgment). The Site Plan depicted the construction of the Project, including an approximate 103,000 square foot mini-warehouse situated in the rear of the Property, and an approximate 67,000 square foot shopping center across the front of the Property, between the main road and the mini-warehouse facility. (*Id.*)

The Site Plan was approved by the City's Planning and Zoning Board on two separate occasions. (App. G-9, State Court Final Judgment; App. D-3, First Final Judgment). The City Council tabled consideration of the Site Plan on three occasions, at which meetings residents living adjacent to the Property actively opposed the Project. (App. G-9-10, State Court Final Judgment). While residents raised "concerns" regarding the Project, no resident or member of the City presented any evidence supporting any of the expressed concerns. (App. D-3, 21, First Final Judgment). Indeed, each of the concerns had been considered by the City's Planning and Zoning Board, which

determined that the Site Plan complied with all of the City's regulations and ordinances regarding such matters. (App. G-7-9, State Court Final Judgment)

Ultimately, on July 12, 1977, the City acceded to the residents' vocal opposition to the Project. (App. F-4, *State Corn I*; App. D-22, First Final Judgment; App. C-2, *Corn III*). Without having conducted any investigation of mini-warehouses or study of whether there was any reason to rezone the Property, (App. D-4, 21, First Final Judgment), the City enacted Ordinance 549, which rezoned the Property from C-1A to B-3, a more restrictive category which did not permit warehouses, and Ordinance 548, which eliminated only storage warehouses as a permitted use in the C-1A zone. (App. D-3, First Final Judgment). This was the first time the City had considered rezoning the Property or changing the uses permitted within the C-1A zoning category. (*Id.*). The City did not afford Corn or anyone notice of its intention to enact these Ordinances. (App. F-4, *State Corn I*).

After enacting the Ordinances and based thereon, the City Council denied approval of the Site Plan. (App. G-12, State Court Final Judgment; App. D-3, First Final Judgment).

The City soon thereafter enacted ordinance 552, which imposed a 150 day building moratorium, prohibiting the issuance of building permits for the two parcels of C-1 property in the City, one of which was the Property (App. G-11, State Court Final Judgment, App. D-3, First Final Judgment). The moratorium was ostensibly enacted to evaluate the impact of C-1 zone uses on adjacent residential property. (App. I-22-25, Ordinance 552). The

Planning and Zoning Board's report was not submitted until December, 1977, months after the Property had already been rezoned B-3. (App. C-35, *Corn III*). The moratorium was extended by Ordinance 568, until July 4, 1978. (App. I-26, 27, Ordinance 568; App. D-4, First Final Judgment). (Ordinances 548, 549, 552, and 568 shall collectively be referred to as the "Ordinances").

The City's "purposeful action" prevented Corn from developing the Project. (App. C-13, *Corn III*).

C. The State Court Litigation – Corn Has Vested Rights in the Project and the City Must Approve the Site Plan.

Corn sued the City in state court, challenging the validity of the Ordinances and seeking to compel the City to approve the Site Plan. (App. D-4, First Final Judgment).[3] On October 20, 1978, the State Court Final Judgment was entered, ruling in favor of Corn. (App. G, State Court Final Judgment).

The trial court found that because Corn had both expended money and made substantial physical changes in the land in reliance upon the City's undertaking in adopting the original zoning ordinances, it was grossly unfair to permit the City to change the zoning of the Property. (App. G-14-15, State Court Final Judgment; App. F-5, *State Corn I*). The City's annexation and zoning

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[3] At the time Corn instituted the state court litigation Florida law did not afford a landowner the entitlement to recover money damages for the unconstitutional taking of property. *Corn I* at 1517.

of the Property and Corn's reliance thereon in preparing the Property for development conferred upon Corn vested rights in the zoning of the Property, and in the Project. (App. G-17, State Court Final Judgment; App. C-3, *Corn III*). As a result, the City was estopped from rezoning the Property and from denying approval of the Site Plan. *Id.* Further, the Ordinances were declared invalid for the City's failure to follow its own notice and procedural requirements for their passage. *Id.* The City had no discretion and was obligated to approve the Site Plan and issue a building permit for the Project upon Corn's correction of three technical deficiencies which the City had never afforded Corn the opportunity to correct. (App. G-12, State Court Final Judgment; App. F-5, *State Corn I*).

The City appealed the State Court Final Judgment. (App. F, *State Corn I*). The City's appeal served to stay enforcement of the State Court Final Judgment, so that the Ordinances and denial of the Site Plan remained in effect during the pendency of the appeal. (App. D-5, First Final Judgment). The State Court Final Judgment was affirmed. (App. F, *State Corn I*). The Florida appellate court issued its mandate on March 4, 1983, at which time the decision became final. (App. D-5, First Final Judgment).

Thereafter, Corn submitted a revised Site Plan to the City for approval, which the City refused to approve unless Corn complied with platting requirements that came into existence after July, 1977. (App. D-5, First Final Judgment). On March 26, 1985, the state court ordered the City to issue Corn a building permit without platting. (App. D-6, First Final Judgment).

Between June, 1977 and March, 1985, Corn was wrongfully prevented from developing the Project while he successfully litigated with the City in state court and established his vested right to build the Project. During the pendency of the litigation Corn did not develop the Property for any other use because he remained intent on developing the Property in accordance with his vested right to build the Project. By the time Corn succeeded in establishing his vested right to develop the Project changes in the area and the growth of competition in the intervening eight years had rendered development of the Project economically unfeasible.

Corn has unsuccessfully attempted to sell the Property since 1985. The Property is still owned by Corn and cannot be developed for any economically viable use.

D. Federal Court Litigation

On January 17, 1984, Corn filed the underlying action, seeking damages for violation of the just compensation, due process and equal protection clauses of the Fifth and Fourteenth Amendments and the Civil Rights Act. (App. D-5, 6, First Final Judgment). The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343. The action was dismissed as unripe under *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). (App. D-7, First Final Judgment). The Eleventh Circuit reversed. (*Corn I*). The Eleventh Circuit later confirmed that Corn's claims were not barred by the statute of limitations or res judicata. (*Corn II*).

On August 30, 1991, following a four day non-jury trial, the district court issued the First Final Judgment,

ruling in favor of Corn on his "substantive due process takings claim".[4] The trial court concluded that the City Council's enactment of the Ordinances and rejection of the Site Plan was motivated solely by an irrational desire to thwart Corn's Project. (App. D-22, First Final Judgment).

Specifically, the trial court made the following findings:

1. Corn had a vested right to build the Project. (App. D-15, First Final Judgment).

2. Corn's vested right in the Project was a constitutionally protected property interest created by Florida law. (App. D-20, First Final Judgment).

3. The City acted arbitrarily and capriciously in denying approval of the Project, failing to independently evaluate the merits of the Project, and instead blindly following the will of the residents. (App. D-21, 22, First Final Judgment).

The district court awarded damages as just compensation to Corn. (App. D-32, First Final Judgment).

Corn appealed the First Final Judgment, claiming that the compensation awarded by the district court was not just. (App. C-5, *Corn III*). The City cross-appealed. (*Id.*) The Eleventh Circuit reversed the First Final Judgment, determining that certain findings of fact of the district court were clearly erroneous. (App. C-38, 39 *Corn III*). The Eleventh Circuit ruled that the proper standard

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[4] Through his substantive due process takings claim Corn maintained that the City's wrongful rejection of the Site Plan was arbitrary and capricious. (App. C-4-5, *Corn III*).

to be applied to Corn's substantive due process claim was whether a rational basis existed for the City's action, and reviewed the evidence and found that a rational basis existed for enacting the Ordinances and rejecting the Site Plan. (App. C-44, *Corn III*).

The Eleventh Circuit remanded the case to the district court for a consideration of Corn's just compensation claim,[5] which had not been ruled upon. (App. C-56, *Corn III*). The Eleventh Circuit also reversed the district court's dismissal of the City Councilmen, determining that the denial of the Site Plan was an administrative act, for which the City Councilmen only had qualified, rather than absolute immunity. (*Id.*).

On remand, the district court issued the Second Final Judgment, ruling in favor of the City and against Corn on Corn's just compensation claim (App. B, Second Final Judgment). Corn appealed the Second Final Judgment to the Eleventh Circuit, which affirmed the judgment in part and remanded the cause to the district court solely for a determination of whether Corn was deprived of all use of the Property during the moratorium.[6] (App. A, *Corn IV*). The Eleventh Circuit concluded as follows:

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[5] Through Corn's just compensation claim Corn maintained that the City's wrongful rejection of the Site Plan deprived him of economically viable use of his constitutionally protected property interest in the Project and the Property. (App. A-6-7, *Corn IV*).

[6] The district court has entered an order concluding that Corn was not deprived of all use of the Property during the moratorium, finding that the moratorium did not apply to the Property, since the moratorium applied to C-1 property and the Property was already rezoned to B-3. Corn has recently appealed this ruling to the Eleventh Circuit. The pendency of

1. While Corn was deprived of a use of the Property, he was not deprived of all uses of the Property from 1977 through 1985, while he successfully established in state court his vested rights and entitlement to build the Project. During the pendency of the state court litigation Corn could have and was obligated to develop the Property for some alternative use. (App. A-13, 14, *Corn IV*).

2. Even if Corn had vested rights in the Project, the City's denial of permission to build the Project does not state a claim for just compensation because Corn was not deprived of all uses of the Property. (App. A-19, *Corn IV*). A denial of the right to develop a particular project may give rise to a claim for just compensation for the taking of the project only if the government action in issue fails to advance a legitimate state interest. (App. A-21, *Corn IV*).

3. A party can have a constitutionally protected property right under the due process clause of the Fifth Amendment which does not qualify as property under the takings clause of the Fifth Amendment, so that just compensation is not due for the taking of the "property". (App. A-19, *Corn IV*).

Through this Petition Corn seeks review of certain legal issues determined in *Corn III* and *Corn IV*.

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this appeal does not have any impact whatever on the issues raised herein. Even if the Eleventh Circuit concludes that the moratorium applied to and deprived Corn of all use of the Property from June, 1977, through July, 1978, such a holding will not entitle Corn to compensation for the taking of the Project and the Property after July, 1978.

REASONS WHY THE WRIT SHOULD ISSUE

A. Corn's Vested Right to Build the Project Was a Constitutionally Protected Property Interest Which Was Confiscated For Which Just Compensation is Due.

1. This Court Has Identified, Without Resolving, the Issue of What Property Interest in Realty are Protected by the Takings Clause.

It is well settled that a landowner who is deprived of economically viable use of his property has suffered a taking for which compensation is due pursuant to the Fifth Amendment. *E.g. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). In *Lucas*, this court identified and did not answer an issue which is squarely raised by this Petition:

> If a landowner has a constitutionally protected property interest in an incident of land ownership less than fee simple title and is deprived of all economically viable use of that property interest, is the landowner entitled to just compensation pursuant to the Fifth Amendment, regardless of whether he is deprived of all use of his land?

In *Lucas*, this court explained:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since *the rule does not make clear the "property interest" against which the loss of value is to be measured.* * * * Unsurprisingly, this *uncertainty regarding the composition of the denominator in our "deprivation" fraction* has produced inconsistent pronouncements by the

> Court. * * * *The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property* – i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. (emphasis added). *Id.* at 1016, n.7.

In this case, the "denominator in the deprivation fraction" is Corn's constitutionally protected property interest in his vested right[7] to build the Project. Corn was deprived of *all* use of this property interest from June, 1977, through March, 1985, thereby effecting a compensable taking of his vested right to develop the Project, irrespective of whether there were other uses to which the Property could be put.[8]

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[7] Indeed, the specific question raised in this Petition of whether a state created vested right to develop land for a specific use or project is a constitutionally protected property interest for which compensation is due if the vested right is taken even if economically viable uses of the land remain was identified without being answered in *Williamson County*:

> We express no view of applying the "economic viability" test when the taking claim is based on such a theory of "vested rights" or "expectation interest". 473 U.S. at 191 n.12.

[8] Corn maintains that he was deprived of all economically viable use of the Property while he successfully pursued the state court litigation and established his right to build the Project because he was not obligated to develop the Property for any other use during the pendency of the litigation. *See* discussion §B, *infra*, at 22-24.

2. Florida Law Creates a Constitutionally Protected Property Interest in Vested Rights.

This Court has clearly explained that property interests protected by the Fifth Amendment's takings clause are not created by the Constitution, and instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *E.g. Lucas,* 505 U.S. at 1016, n.7; *Ruckelshaus v. Monsanto Company,* 467 U.S. 986, 1001 (1984).[9]

It was conclusively established through the state court litigation that Corn had a vested right to build the Project so that the City was estopped from rezoning the Property and was compelled to approve the Site Plan and

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[9] In *Corn IV,* the Eleventh Circuit erroneously stated that "property" as used in the just compensation clause of the Fifth Amendment is defined much more narrowly than in the Fifth and Fourteenth Amendments due process clauses, so that while certain property interests may not be taken without due process, they may be taken without paying just compensation. (App. A-18, 19, Corn IV). The Eleventh Circuit is clearly wrong.

This Court has employed the identical standard of looking to existing rules or understandings that stem from an independent source such as state law to determine whether a party has a property interest for both takings cases, *e.g. Lucas,* 505 U.S. at 1030, and due process cases *E.g. Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Since resort is made to the same legal standard, an interest is either a property interest for both the takings clause and due process clause, or it is not a protected property interest for either clause. *See Texaco v. Short,* 454 U.S. 516, 525 (1982) (evaluation of whether Indiana state law created property interest in mineral rights for both claims of violation of due process and taking of property).

issue a building permit. (App. G, State Court Final Judgment; App. F-9, *State Corn I;* App. C-3, *Corn III*). Florida law creates a constitutionally protected property interest in Corn's vested right to develop the Project.

A vested right under Florida law is a property right which is created as a matter of fairness to protect the property owner from the loss of an interest in property which he has enjoyed. *Hollywood Beach Hotel v. City of Hollywood,* 329 So.2d 10, 15-16 (Fla. 1976). A city is equitably estopped from depriving a property owner of a particular property right as a result of conduct of the city upon which the landowner has relied to his detriment. *Id.; Sakolsky v. City of Coral Gables,* 151 So.2d 433, 436 (Fla. 1963). The city is estopped from exercising its police power to prohibit a particular use of land when the landowner's change of position in reliance on the city's actions would render it inequitable and unjust to destroy the right to use the land the landowner has acquired. *Hernando County Board of Commissioners v. S.A. Williams Corporation,* 630 So.2d 1155, 1156 (Fla. 5th DCA 1993). Under such circumstances the landowner's right to develop the property for a particular use becomes vested, and is not subject to revocation. *Hollywood Beach Hotel,* 329 So.2d at 16.

Vested rights are based upon the recognition that a landowner's reliance upon a city's conduct creates an expectancy or an entitlement to certain rights which it would be inequitable to allow a city to revoke. *Town of Largo v. Imperial Homes Corporation,* 309 So.2d 571, 573 (Fla. 2d DCA 1975). Vested rights thus protect a landowner against even otherwise *valid* zoning ordinances because, as a matter of fairness, a city cannot deprive a

landowner of a property interest created under such equitable circumstances. *Id.*

Florida courts have recognized that a property owner can have a vested right in a particular zoning classification, which prohibits a city from rezoning property. *Hollywood Beach Hotel*, 329 So.2d at 16; *Town of Largo*, 309 So.2d at 574. Florida courts have also recognized that a property owner can have a vested right in a building permit, or to the issuance thereof, thereby estopping the city from withdrawing or refusing to issue a permit. *Hollywood Beach Hotel*, 329 So.2d at 16; *The Florida Companies v. Orange County*, 411 So.2d 1008, 1011 (5th Cir. DCA 1982); *Town of Largo*, 309 So.2d at 573.

Having accorded vested rights such legal recognition and protection, Florida law has conferred the status of constitutionally protected property interests upon vested rights. *See Lucas*, 505 U.S. at 1016, n.7, 1030.

3. The Eleventh Circuit Recognizes that Vested Rights are Constitutionally Protected Property Interests Under Florida Law.

The Eleventh Circuit has confirmed that as a matter of constitutional law Florida law creates a constitutionally protected property interest in the vested right in a particular project or a building permit. *Reserve Ltd. v. Town of Long Boat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 729 (1995) (Florida law creates constitutionally protected property interest in a building permit); *Spence v. Zimmerman*, 873 F.2d 256, 257-58 (11th Cir. 1989) (constitutionally protected property interest in a

permit or certificate of occupancy if the city lacks discretion and must issue the permit or certificate); *AA Profiles v. City of Fort Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), (property interest in woodchipping development); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990) (property interest in apartment project).

4. Recognizing Vested Rights as Constitutionally Protected Property Interests is Consistent with Supreme Court Takings Jurisprudence.

Recognizing that a vested property right is a constitutionally protected property interest for which compensation is due under the Fifth Amendment for its wrongful taking is consistent with takings jurisprudence.[10]

This Court has held that a property interest in real estate which is less than fee simple title ownership can be a constitutionally protected property interest for which compensation is due for its taking under the Fifth Amendment. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this court recognized that the right to

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[10] Scholars have recognized that vested rights have a constitutional base, conferring constitutional protection on property rights a landowner has acquired in the use of his land. D. Mandelker, *Land Use Law*, The Zoning Process §6.12, at 214 (1988). Vested rights have been recognized as a "super property right", being immune from exercise of the police power, and as such possessing more constitutional propriety weight than a mere property right. Hanes and Minchew, On Vested Rights To Land Use and Development, 46 *Washington Law Review* 373, 376 (1989). The exercise of regulatory police power that causes the diminishment of a vested right is one that goes "too far"." *Id.*

exclude others from one's property is a constitutionally protected property interest. *Id.* at 834; *see also Dolan v. City of Tigard*, 512 U.S. 374, 384. In *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), this court held that the reservation of the right to mine underground coal was a constitutionally protected property interest. *Id.* at 413. Invasion of a landowner's airspace by planes whose noise diminished but did not destroy all viable use of the land was recognized as effecting a taking. *United States v. Causby*, 328 U.S. 256, 262 (1946). A tenant's leasehold interest in property, has been held to be a constitutionally protected property interest. *E.g. United States v. General Motors Corp.*, 323 U.S. 359, 378, 1945). Indeed, a real estate lien to secure a mortgage has been held to be a constitutionally protected property interest. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935). The taking of the right to devise a fractional interest in land has been held to effect a compensable taking. *Babbit v. Toupee*, 117 S.Ct. 727, 731-32 (1997).

In each of these cases the landowner had an expectation created by state law that the particular incident of ownership in land would not be interfered with or taken, thereby conferring constitutional protection upon each such property interest. Each interest in land in issue was an "essential stick in the bundle of rights that are commonly characterized as property", *see Nollan* at 831, because of the protection afforded the property interest by state law and the landowner's expectation of retaining the particular interest as a result thereof. Such state law legal recognition and protection creates a constitutionally

protected property interest in the incident of land ownership in issue for which just compensation is due pursuant to the Fifth Amendment if the property interest is taken.

In this regard, a factor "of particular significance" which is evaluated in determining whether a taking has occurred is the government's "interference with reasonable investment backed expectations". *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Vested rights are based upon the notion of the fairness of protecting and preserving a landowner's reasonable investment backed expectations created as a result of his detrimental reliance on governmental action. *See Hollywood Beach Hotel*, 329 So.2d at 15-16. Accordingly, by definition, one *always* has reasonable investment backed expectations in a vested property right. *See Town of Largo*, 309 So.2d at 573. Vested rights are thus appropriate property interests to be recognized as having been afforded constitutional protection pursuant to Florida law.[11]

5. *Corn IV* Failed to Protect Corn's Vested Rights.

The Eleventh Circuit erred as a matter of law in holding that the City's confiscation of Corn's vested right

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[11] This Court has protected vested rights from interference or confiscation by retroactive legislation. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). Indeed, in *Landgraf* this Court explained that the anti-retroactivity principle finds expression in several provisions of the Constitution, including the Fifth Amendment, which prevents government "from depriving private persons of *vested rights* except for a "public use" and upon payment of "just compensation"." (emphasis added). *Id.*

to build the Project did not give rise to a just compensation claim because Corn was not deprived of all use of his Property. The Eleventh Circuit erred by placing the Property in the denominator of the takings equation, rather than placing the Project in the denominator.

As a matter of law, Corn had a constitutionally protected property interest in the Project. The City's enactment of invalid Ordinances and wrongful denial of the Site Plan confiscated Corn's vested right to build the Project, entitling him to just compensation pursuant to the Fifth Amendment therefor, irrespective of whether Corn retained other economically viable uses of the Property.

B. The Confiscation of Corn's Constitutionally Protected Property Interest in the Project Effected a Taking of the Property Throughout the Pendency of the State Court Litigation.

Corn was indeed deprived of all economically viable use of the Property during the pendency of the state court litigation. Corn acknowledges that between July, 1978,[12] and March, 1985 there were alternative uses for which the Property "could" have been developed.[13] Nonetheless,

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[12] Between June, 1977 and July, 1978, Corn was prevented from developing the Property for any use pursuant to the moratorium ordinances. This is the sole issue currently on appeal to the Eleventh Circuit.

[13] By March, 1985, due to changes in demographics and overbuilding in the area, there was no economically feasible use to which the Property could be put, so that the temporary taking matured into a permanent taking.

Corn was not obligated to waive his constitutional rights and moot his state court litigation by developing the Property for any alternative use while successfully establishing his vested right to build the Project. As such, Corn was deprived of all use of his Property.

The Eleventh Circuit held that Corn was not deprived of all economically viable use of the Property during the pendency of the state court litigation, explaining:

> The standard is not whether the landowner has been denied those uses *to which he wants to put his land*; it is whether the landowner has been denied all or substantially all economically viable use of his land. (emphasis added). (App. A-13, *Corn IV*).

The error in the Eleventh Circuit's reasoning is that Corn's right to build the Project was not a use to which he simply *wanted* to put the Property; instead, Corn had a *vested right* to build the Project, with which right the City could not lawfully interfere. While Corn successfully participated in the state court litigation and established that he was wrongfully prevented by the City from building the Project he was not legally obligated to develop the Property for any alternative use.

As a practical matter, if Corn developed the Property for an alternate use, he would not have been able to build the Project. As a legal matter, development of an alternate use would have rendered moot the controversy regarding the City's duty to approve the Site Plan. *See Glisson v. Alachua County*, 558 So.2d 1030, 1037 (Fla. 1st DCA 1990) (issue of whether land use regulation effected taking of

property rendered moot when regulation amended); *Central and Southern Florida Flood Control District v. Duquis*, 162 So.2d 289, 291 (Fla. 3d DCA 1964) (conveyance of property to flood control district rendered moot issue of validity of reservation of rights to flood control district). Corn could not put the Property to any use during the pendency of the state court litigation without forfeiting his vested right to build the Project, and his constitutional right to be compensated for the City's confiscation of the Project. Corn would have forfeited his constitutional right to seek just compensation for the confiscation of the Project by mooting his state court claim because Corn's takings claim could never ripen without a resolution of the state court litigation. *Williamson County*, 473 U.S. at 194-95. The well settled doctrine of "unconstitutional conditions" prevents the City from forcing Corn to choose between developing the Property for an alternate use and Corn's right to develop the Project or to receive just compensation for the City's confiscation of the Project. *See Dolan*, 512 U.S. at 2317.

Since Corn could not be lawfully compelled to develop the Property for an alternate use during the pendency of the state court litigation, he was indeed deprived of *all* use of his Property during that time. Accordingly, Corn is entitled to just compensation for the taking of his Property.

The City always had the option of abandoning its confiscation of the Project at any time during the pendency of the state court litigation. *See First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S 304,

317 (1987).[14] Instead, the City elected to appeal rather than accept the State Court Final Judgment, and thereafter improperly condition approval of the Site Plan on platting the Property, thereby perpetuating the confiscation of the Project. Denying Corn just compensation because he could have developed the Property for an alternate use during the pendency of the state court litigation only serves to allow the City to accomplish that to which it did not have any legal or constitutional right – to prevent Corn from developing the Project without compensating him for confiscating his vested right to do so.

The Constitution and policy considerations dictate that Corn receive just compensation for his loss of all use of his Property during the pendency of the state court litigation.

C. Corn Established That the City's Actions Failed to Substantially Advance any Legitimate State Interest.

In *Corn III*, the Eleventh Circuit reviewed Corn's substantive due process claim.[15] The court held that a substantive due process claim requires the landowner to show that the City abused power and that the regulation

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[14] The pendency of the state court litigation for over seven years is clearly the type of abnormal delay in obtaining permits for which a taking claim arises. *See First English*, 482 U.S. at 321.

[15] This Court can consider questions raised in earlier appeals in a case in which there have been multiple appeals. *Mercer v. Theriot*, 377 U.S. 152, 153 (1964). Further, Corn raised these issues and they were considered in *Corn IV*. (App. A-9-10, *Corn IV*).

in issue does not bear a substantial relation to the public health, safety, morals, or general welfare. (App. C-10, *Corn III*). The court held that the burden is on the *developer* to prove that the governmental body acted arbitrarily and capriciously in refusing permission for the development, (App. C-10, *Corn III*), explaining that the inquiry is limited to whether the city's action had a rational relationship to a legitimate general welfare concern. (App. C-11, *Corn III*). The Eleventh Circuit reversed the First Final Judgment entered in favor of Corn, determining the district court had erred by applying the strict scrutiny standard of review instead of the deferential standard of the rational basis test. (App. C-38, *Corn III*).

1. The City's Enforcement of Invalid Ordinances and Wrongful Rejection of the Site Plan Was an Abuse of Power Which Could Not Advance Any Legitimate State Interest.

Preliminarily, in the typical takings case in which the issue is whether governmental regulation substantially advances a legitimate state interest, the regulation in issue is valid; accordingly, the analysis is whether the otherwise valid governmental regulation is invalid because the regulation fails to substantially advance a legitimate state interest. *E.g. Nollan*, 483 U.S. at 834. The inquiry focuses on the nexus between the governmental action and the professed legitimate state interest. *Dolan*, 512 U.S. at 386.

In this case it was conclusively established in state court that the Ordinances were invalidly enacted and that the City was estopped from denying approval of the Site

Plan. (App. G-15-17, State Court Final Judgment; App. F-5, 9, *State Corn I*). The City lacked discretion and was obligated to perform the ministerial act of approving the Site Plan which it had wrongfully rejected. (App. F-10, *State Corn I*). Accordingly, the "governmental regulation" in issue was invalid, irrespective of whether the requisite nexus between the City's actions and any legitimate state interest existed. Under these circumstances it is not necessary to examine the nexus between the City's conduct and its claimed legitimate state interest; invalid, prohibited regulation can never advance any legitimate state interest.

The City was estopped from exercising its police power and denying approval of the Site Plan. *See Hernando County*, 630 So.2d at 1156. It does not matter what motivated the City to wrongfully deny the Site Plan. It does not matter if the denial of the Site Plan would have served any legitimate state interest. The level of scrutiny between the City's wrongful actions and any putative legitimate state interest is irrelevant. Any attempted exercise of police power by the City was per se invalid and, accordingly, could not and did not advance any legitimate state interest.

Inexplicably, notwithstanding the State Court Final Judgment, the Eleventh Circuit engaged in a lengthy analysis of whether the City's invalid Ordinances and wrongful rejection of the Site Plan served the general welfare. (App. C-14-52, *Corn III*). Such analysis improperly disregards the conclusive effect which a state court judgment is to be afforded in federal court. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982); *Allen v. McCurry*, 449 U.S. 90, 95-96 (comity between state and

federal courts the 'bulwark of the federal system'). The Ordinances could not be invalid under state law yet substantially advance any legitimate interest as a matter of constitutional law. The City's improper rejection of the Site Plan could not be prohibited under state law yet pass constitutional muster as advancing a legitimate interest. The full faith and credit which must be accorded the State Court Final Judgment mandates the conclusion that the city's wrongful rejection of the Site Plan failed to substantially advance any legitimate state interest.

The consequence of the City's abuse of power was the confiscation of Corn's right to build the Project and loss of all the use of the Property, thereby effecting a compensable taking.

2. The *Dolan* Rough Proportionality Standard Applies and Was Not Met by the City.

Alternatively, even if it is appropriate to analyze the nexus between the City's actions and any claimed legitimate state interests, the Eleventh Circuit identified and applied the incorrect standard of review. There must be a greater nexus than a rational basis between the denial of the Site Plan and the general welfare concerns identified in *Corn III*.

In *Dolan*, this Court identified the level of scrutiny to be applied to a city's actions to determine whether they are substantially related to a legitimate state interest. *Dolan*, 512 U.S. at 385. This Court identified the "essential nexus" which must exist between the professed legitimate state interest and the actions of the city. *Id.*

This Court held that when a city makes an adjudicative decision as distinct from a legislative one, the burden properly rests on the *city* to prove that its actions substantially advance a legitimate state interest. *Id.* at 391 n.8. There must be a "rough proportionality" between a city's actions and the stated public purpose. *Id.* at 391. Rough proportionality requires a reasonable relationship, a standard more strict than the rational basis level of scrutiny under the equal protection clause of the Fourteenth Amendment. *Id.* While no precise mathematical calculation is required, a city must make some effort to quantify its findings in support of its actions, and cannot simply believe that its actions will accomplish the desired result, to substantially advance a legitimate state interest. *Id.* at 395, 396.

The *Dolan* rough proportionality standard is applicable to this case. The City conditioned Corn's right to develop the Property on his forfeiture of his vested right to develop the Project, thereby seeking to exact a constitutionally protected property interest from Corn. Further this exaction was effected by an administrative act – the rejection of the Site Plan – and not a legislative act. (App. F-10, *State Corn I*). Accordingly, under *Dolan* it was the *City's* burden to establish that the rejection of the Site Plan bore a reasonable relationship or rough proportionality to the general health and welfare concerns the City allegedly sought to achieve.

Dolan establishes that the City indeed had an obligation to make a formal investigation of the Project before rejecting the Site Plan. Expression of citizen's concerns are not a sufficient basis upon which to take action. The City had to have actual evidence that the Project would

have a significant negative impact on traffic, parking, noise, aesthetics and any other matters of public interest before the City could lawfully reject the Site Plan in reliance thereon. *See Dolan*, 512 U.S at 395-96.

There is no dispute that the City lacked the requisite findings to sustain its rejection of the Site Plan in the name of the general welfare. Initially, the Planning and Zoning Board had recommended approval of the Site Plan twice after becoming satisfied that the Project complied with City regulations, including fire safety, traffic and landscaping. The City Council did not investigate mini-warehouses before acting. The City did not have the benefit of the report it directed the Planning and Zoning Board to prepare regarding the proximity of industrial uses to residences when it rezoned the Property and rejected the Site Plan. The City did not eliminate or prohibit other allowable uses of the Property which arguably cause more traffic, noise and air pollution. (App. D-21, First Final Judgment). While residents attended City Council meetings and expressed opposition to and concerns regarding the Project, the residents did not present the City with *any* evidence establishing *any* nexus between the Project and their concerns. There simply was no reasonable relationship between the represented public interest concerns and the Project to entitle the City to reject the Site Plan.[16]

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[16] If the *Dolan* rough proportionality standard does not apply this Court must identify the standard for analyzing the nexus between a city's actions and identified state interests in takings cases. The record evidence establishes that the invalid Ordinances and wrongful denial of the Site Plan failed to substantially advance any legitimate state interest, regardless of which standard applies.

CONCLUSION

The Eleventh Circuit has acknowledged that the issues presented through this Petition "reach beyond the fisc of one Florida community and the merits of one case, and involve questions about how decision making is allocated between a democratic institution such as an elected city council and the federal courts". (App. C-7, *Corn III*). The Eleventh Circuit has also acknowledged that the issues presented herein have not been addressed or decided by this Court. (App. A-16, n.5, *Corn IV*).

This case provides this Court with the opportunity to establish legal guidelines to be applied by the federal courts and state court in takings claims involving the taking of vested rights and takings effected through enforcement of invalid regulation. The issues presented are both significant and commonplace. All governmental entities and landowners shall benefit from this Court's resolution of the legal issues presented herein.

Corn respectfully requests this Court to grant Certiorari to consider the issues presented herein.

DATED: August 15, 1997

Respectfully submitted,

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APPENDIX M

In the United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 97-3556

HERMAN CORN, Trustee,

Appellant,

vs.

CITY OF LAUDERDALE LAKES,
a Florida municipal corporation, et al.

Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT

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March 10, 1998

HERMAN CORN, Trustee vs. CITY OF LAUDERDALE LAKES, a Florida municipal corporation, et al., CASE NO. 97-5336

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for Appellant, HERMAN CORN, Trustee, hereby certifies that the following is a complete list of the trial judges, all attorneys, and all persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this particular case, including identifiable legal entities:

Lyman L. Allen

James C. Brady, P.A.

Carolyn Caster

Carolyn Caster, a Florida corporation

Milton Caster

Milton Caster, a Florida corporation

City of Lauderdale Lakes

Jerome J. Cohan

Corn Construction Corp., a Florida corporation

Herman Corn

Herman Corn, Trustee

Hilda Corn

Stephen H. Corn

Howard Craft

Honorable Gary M. Farmer

Rita and Irving Freidman Family Trust

Alfonso Gereffi

Louis Greenwald

Earl Johns

Earl Johns, Trustee of D.D.Y. Trust

Morris Klein

Andrew T. Lavin
Romanik, Lavin, Huss & Raoli
Navon, Kopelman, O'Donnell & Lavin, P.A.

Lesgreen Corp., a Florida corporation

Leslie Corn Corporation, a Florida corporation

Michael C. Mattson, Esq.
Cooney, Haliczer, Mattson, Lance,
Blackburn, Pettis & Richards, P.A.

Morgan, Lewis & Bockius

James C. Paine, District Judge (S.D. Fla.)

Estelle Silverman

Saul S. Silverman

Lillian Teperson

STATEMENT REGARDING ORAL ARGUMENT

Appellant Corn hereby requests oral argument.

Oral argument shall afford the parties with the opportunity to address any questions this court may have regarding the substantial record or the legal issues presented in this appeal.

STATEMENT OF TYPE SIZE AND STYLE

This brief has been prepared in the type size and style of: 14 point Times Roman.

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STATEMENT OF JURISDICTION

The district court's Final Judgment and Findings of Fact and Conclusions of Law Upon Remand and the Order Denying Plaintiff's Motion to Set Aside Findings of Fact and Conclusions of Law and For New Trial are appealable as final decisions pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Are the district court's findings of fact that the City's one year moratorium on issuance of building permits did not apply to Corn's property, so that Corn was not deprived of all economically viable use of the property during the moratorium clearly erroneous when:

a) the record evidence is uncontroverted that the City intended for the moratorium to apply to Corn's property, and acted as if the moratorium applied to the property,

b) the City has made numerous judicial admissions over the past 20 years that the moratorium applied to the Property and deprived Corn of all use of his property, and

c) courts have found that the moratorium applied to the property and deprived Corn of all use of the Property?

2. Did the district court deprive Corn of his constitutional right to procedural due process on remand by failing to afford Corn an opportunity to be heard and present evidence on factual issues which were first raised by this Court on appeal because these matters had not been previously contested by the City?

STATEMENT OF THE CASE

I. Nature of the Case

On July 12, 1977, the City of Lauderdale Lakes ("City"), rejected a site plan, (the "Site Plan"), submitted by Appellant Corn ("Corn"), for the development of a mini-warehouse facility with an attendant strip shopping center (the "Project"), on an 8½ acre parcel of property

(the "Property"), situated in the City. To ensure that Corn could not develop the Project on the Property the City rezoned the Property from C-1A to a B-3 zoning category, eliminated warehouses as an authorized use in the C-1 zoning district and enacted a moratorium on the issuance of building permits for Corn's Property for one year.

Corn successfully sued the City in state court and had all of the ordinances declared to have been wrongfully enacted and inapplicable to the Property. The state court directed the City to approve the Site Plan and issue a building permit for the Project upon Corn's correction of three minor items on the Site Plan. The City appealed and the state court litigation was not finalized until 1985, during which time Corn was prevented from building the Project.

Through this federal litigation instituted in 1984, Corn has sought just compensation for the City's unconstitutional taking of his Property. To date, Corn's efforts to secure compensation have been unsuccessful. Most of Corn's claims have been considered and rejected by this Court.

This appeal involves a review of the district court's determination that the approximate one year moratorium did not apply to the Property, and accordingly did not deprive Corn of all economically viable use of the Property. These findings are clearly erroneous. There is no record evidence whatsoever to support the findings. To the contrary, the record unequivocally establishes that the city interpreted the ordinances imposing the moratorium as applying to the Property and for the past twenty years

has expressly acknowledged that the moratorium applied to the Property.

Corn seeks the opportunity to recover just compensation for, at the least, the confiscation of his Property for the one year during which the moratorium was in effect and prevented him from using the Property.

II. The Course of Proceedings

This appeal is a continuation of litigation between these parties which commenced in state court in 1977, and has continued since then, uninterrupted.

During 1977, Corn instituted litigation in state court (the "State Court Litigation"), against the City and its individual City Council members (the "Appellee Councilmen"). (PX-43, Amended Petition for Mandamus). Through the State Court Litigation Corn challenged the validity of three ordinances which had been enacted by the City, (collectively referred to as the "Ordinances"), and the City's denial of Corn's Site Plan. The Ordinances rezoned the Property, deleted warehouses as a permitted use in the zoning category originally applicable to the Property, and established a moratorium on the issuance of building permits for the Property for approximately one year (the one year ban referred to as the "Moratorium"). Corn sought a Writ of Mandamus, contending that the Ordinances were invalid as applied to the Property and that the City had a ministerial duty to approve the Site Plan and issue a building permit for the Project.

On October 20, 1978, the state court issued its Final Judgment, (the "State Court Final Judgment"), declaring

the Ordinances invalid, and directing the City to approve the Site Plan upon Corn's correction of three minor deficiencies, and to issue a building permit for the Project (PX-48, State Court Final Judgment).

The City appealed the State Court Final Judgment. On February 16, 1983, the appellate court affirmed the State Court Final Judgment. *City of Lauderdale Lakes v. Corn*, 427 So.2d 239 (Fla. 4th DCA 1983) (*"State Corn"*). (R1-1 Exhibit P).

On January 17, 1984, Corn filed a Complaint in the Southern District of Florida against Appellees seeking damages pursuant to 42 U.S.C. § 1983, for Appellees' taking of Corn's Property without just compensation in violation of the Fifth Amendment and Fourteenth Amendment. (R1-1, Complaint). Corn alleged that Appellees' enactment and enforcement of the Ordinances and wrongful denial of the Site Plan in 1977 effected a temporary taking of the Project and the Property. Included in the Complaint were counts seeking compensation for inverse condemnation, or the taking of the Property without just compensation, and the recovery of damages for violation of Corn's rights of substantive due process. *Id.*

On October 26, 1984, Corn filed a Motion to Enforce Final Judgment in the State Court Litigation. (PX-64A). Corn sought to have the state court enforce the State Court Final Judgment and require the City to unconditionally approve a revised Site Plan he had submitted and issue Corn a building permit. *Id.* On March 26, 1985, the state court entered an Order, finding in favor of Corn,

and directing the City to forthwith issue a building permit upon Corn's submission of appropriate plans and specifications. (PX-64b).

In the federal litigation, the district court dismissed Corn's Complaint, relying upon *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S 172 (1985). (R2-49, Order). Corn appealed the dismissal of the Complaint to this Court. (R2-51, Notice of Appeal). This Court reversed the dismissal of the Complaint, and remanded the case to proceed to trial. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) ("*Corn I*").

Appellees again moved to dismiss the Complaint and for summary judgment (R2-65, 67). The district court denied the Motion to Dismiss and for Summary Judgment of Appellee City, (R3-85), and ultimately granted the Motion to Dismiss filed on behalf of the Appellee Councilmen, determining that the Appellee Councilmen enjoyed absolute legislative immunity from suit (R4-101, Order).

In September, 1988, the district court acknowledged uncertainty as to whether the City was entitled to Summary Judgment, and for that reason, certified an interlocutory appeal to this Court of the denial of the City's Motion for Summary Judgment. (R4-107, Order). In November, 1988, this Court granted the City's petition for permission to appeal, the district court's Order denying its Motion for Summary Judgment pursuant to 28 U.S.C. § 1292(b). (R5-159, Order).

In *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990), ("*Corn II*"), this Court affirmed the district

court's denial of the City's Motion for Summary Judgment, holding that Corn's action was not barred by the doctrine of res judicata or the statute of limitations. (*Id.* at 587-88).

Thereafter, the cause was remanded to the district court and the case was set for trial. (R5-104, Mandate). This cause proceeded to a four day non-jury trial held August 12-15, 1991, before the Honorable James C. Paine, District Judge. On August 30, 1991, the district court entered its Findings of Fact and Conclusions of Law, ("First Findings of Fact"), (R7-208), and its Final Judgment, ("First Final Judgment"), (R7-209), ruling in favor of Corn on his substantive due process claim. The district court found that the City had acted arbitrarily and capriciously in denying approval of the Site Plan, and awarded damages in the total sum of $727,875.02. (*Id.*).

Corn appealed the First Final Judgment, claiming the compensation awarded by the district court was not just. (R7-224). The City thereafter cross-appealed. (R7-226). This Court reversed the First Final Judgment, determining that certain findings of fact of the district court were clearly erroneous and that Corn had failed to establish his substantive due process claim that the City acted arbitrarily and capriciously. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1391 (11th Cir. 1993), *cert. denied*, 511 U.S 1018, (1994), ("*Corn III*").

This Court remanded the case to the district court for a consideration of Corn's just compensation claim, which had not been ruled upon by the district court. *Id.* at 1393. This Court also reversed the district court's dismissal of the Appellee Councilmen, determining that they did not

have absolute immunity from suit, and instead only had qualified immunity in connection with their denial of the Site Plan. *Id.* at 1393.

On March 29, 1994, the district court issued its Order Upon Appellate Mandate, directing the parties to file Status Reports addressing matters including the legal standards to be applied to Corn's just compensation claim, the applicability of qualified immunity to the Appellee Councilmen, and the need for additional court proceedings on these claims. (R7-264). Corn and the City thereafter filed their respective Status Reports. (R7-267, R7-268). Corn acknowledged in his Status Report that a new trial to resolve his just compensation claim was not needed *unless* the court thought it would be necessary to receive additional evidence on whether Corn was denied substantially all economically viable use of the Property. (R7-267, Corn's Status Report at 3, n.1.).

On June 13, 1994, the district court issued its Findings of Fact and Conclusions of Law upon Remand (the "Second Findings of Fact"), and its Final Judgment (the "Second Final Judgment"). (R7-273, 274). Through the Second Findings of Fact and Second Final Judgment the court found in favor of Appellees and against Corn on Corn's just compensation claim and entered judgment in favor of Appellees and against Corn.

Corn appealed the Second Final Judgment. (R7-280). This Court affirmed the Second Final Judgment in part, and vacated that portion of the Second Final Judgment regarding Corn's claim that the Moratorium effected a temporary taking of the Property because the district court's findings were not sufficient for effective appellate

review. *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1076 (11th Cir. 1996, *cert. denied*, 511 U.S. 1018, (1997) ("*Corn IV*"). This Court remanded this cause to the district court to make findings as to the economically viable uses of the Property during the Moratorium. *Id.* at 1073.

On April 25, 1997, four days after this Court denied Corn's Petition for Rehearing of *Corn IV*, the district court entered its Findings of Fact and Conclusions of Law Upon Remand (the "Third Findings of Fact") and "Third Final Judgment"). (R7-1284). The district court found that since the Moratorium applied to C-1 zoned property and the Property was rezoned on July 12, 1977, from C-1A to B-3, the Moratorium did not apply to the Property, and Corn could have developed the Property for B-3 use any time after July 13, 1977. (R7-284-11). The district court thus concluded that Corn was not deprived of all economically viable uses of the Property during the Moratorium and entered judgment in favor of the City. (R7-284-12).

Corn moved to set aside the Third Findings of Fact claiming that he was deprived of due process of law because the trial court did not allow Corn any opportunity to be heard or present evidence on the issue of whether Corn was deprived of all economically viable uses of the Property during the Moratorium. (R7-286). Corn's motion was denied. (R7-287).

Corn perfected this appeal by filing his Notice of Appeal on July 30, 1997. (R7-288).

III. Statement of the Facts

The Property was part of a 261 acre tract, (the "Parcel"), acquired by Corn in 1966, when the Parcel was located in unincorporated Broward County, and zoned for agricultural use. (State Court Final Judgment at 1-2; R9-42-43 Herman Corn; First Findings of Fact at 1559). The City approached Corn regarding annexation of the Parcel. (R9-42, Herman Corn). The Parcel was annexed into the City and ordinances were enacted zoning the acreage within the Parcel for residential, commercial and industrial use, in accordance with Corn's proposed development plan (R9-43-47, Herman Corn; First Findings of Fact at 1560).

Ordinances 105, enacted by the City during 1966 zoned the Property C-1A, (PX26-11, Ordinance 105), light industrial use. (R11-530, Schiff). The land immediately north and west of the Property was zoned for residential use (R9-48, Herman Corn; Findings of Fact at 1560). The Property was bounded on the south by an existing canal and on the east by U.S. 441. (*Id.*; PX-57A-C aerial photographs). Corn expended in excess of $100,000.00 in reliance upon the City's actions of annexing and zoning the Property C-1A, developing the Property for its ultimate use as C-1A property. (State Court Final Judgment at 2; R9-85, Stephen Corn; First Findings of Fact at 1560). Corn constructed canals on the western and northern borders of the Property to create a buffer between the Property and the proposed residential areas. (State Court Final Judgment at 2; R9-48, Herman Corn; First Findings of Fact at 1560). These canals fixed the dimensions of the Property at 370' wide fronting on U.S 441, and 1,030' deep. (R9-84, Stephen Corn).

Corn thereafter developed the Parcel in accordance with the original plan, first building single family homes and then condominiums. (State Court Final Judgment at 2, 12; R9-81-82, Stephen Corn).

On April 1, 1977, Corn submitted the Site Plan to the City. (PX-20, Site Plan; R9-97, Stephen Corn; Findings of Fact at 1560). The Site Plan depicted the construction of the Project, including an approximate 103,000 square foot mini-warehouse covering the majority of the Property and an approximate 67,000 square foot shopping center across the eastern portion of the Property, fronting on U.S. 441, situated in front of the mini-warehouse facility. (*Id.*)

The Site Plan was approved by the City's Planning and Zoning Board on two separate occasions. (State Court Final Judgment at 7; PX-26-43, 26-44, Planning and Zoning Board Memoranda; Findings of Fact at 1560). The City Council tabled consideration of the Site Plan at meetings held on May 31, June 14 and June 21, 1977. (State Court Final Judgment at 7-8; R9-106, Stephen Corn; Findings of Fact at 1560). At these meetings residents living adjacent to the Property actively opposed the Project. These individuals resided in the residential portions of the Parcel which the City knew in 1966 would be adjacent to the Property for which Corn had expended money to create the canal buffer. (State Court Final Judgment at 12). While residents raised concerns regarding the Project, *Corn III* at 1387, each of these issues had been considered by the City's Planning and Zoning Board, and it was determined that the Site Plan complied with all of the City's regulations and ordinances regarding these matters. Further, prior to July 12, 1977, the City Council did not make any

attempt to investigate mini-warehouse uses or to determine whether any of the residents' concerns regarding the Project were valid. (R11-500-02 Craft; First Findings of Fact at 1560).

Ultimately, on July 12, 1977, before considering approval of the Site Plan the City Council passed on first reading Ordinance 549, (PX-78), which rezoned the Property from C-1A to B-3, a more restrictive category, and Ordinance 548, (PX-77), which eliminated storage warehouses as a permitted use in zoning categories C-1 and C-1a. (State Court Final Judgment at 9; First Findings of Fact at 1560). The City did not eliminate any other uses from the C-1A zoning category, including uses which caused more traffic, noise or other alleged concerns of the City. (R11-515, Craft; First Findings of Fact at 1560). This was the first time that the City Council considered rezoning the Property or changing the permissible uses within the C-1A category. (State Court Final Judgment at 9; R11-508-09, Craft; First Findings of Fact at 1560).

After passing these ordinances on first reading and based thereon, the City Council denied approval of the Site Plan. (PX-22, City Council Minutes; First Findings of Fact at 1560).

The City soon thereafter enacted Ordinance 552, (PX-79), which imposed a 150-day building moratorium, prohibiting the issuance of building permits for the two parcels of C-1 property in the City, one of which was the Property. (State Court Final Judgment at 9; First Findings of Fact at 1560). The stated purpose of the moratorium was to determine whether the two C-1 parcels which were adjacent to residentially zoned property should be

rezoned. (PX-79). The Planning and Zoning Board was directed to submit a report within 60 days. *Id.* This report was not submitted until December 23, 1977. (*Corn III* at 1384).

On September 20, 1977, Ordinance 549, which rezoned the Property from C-1A to B-3, was passed on second reading, at which time Ordinance 549 first became effective. (PX-78; R2-86-8, City Answer).

On January 10, 1978, Ordinance 568 was enacted on an emergency basis, extending the moratorium through July 4, 1978. (PX-60; Findings of Fact at 1561). (Ordinances 552 and 568 shall hereafter be collectively referred to as the "Moratorium Ordinances"). Accordingly, the Moratorium was in effect for almost one year.

Corn then filed the State Court Litigation, challenging the validity of the Ordinances and seeking to compel the City to approve the Site Plan. (PX-43, Amended Petition for Mandate; First Findings of Fact at 1561). The State Court Final Judgment determined that Corn had vested rights to the C-1A zoning of the Property, based upon his following of the previously approved plan of development for the Parcel, the substantial physical change made to the characteristics of the Property, including the construction of the canals, and the expenditure of in excess of $100,000.00 developing the Property. (State Court Final Judgment at 11-14). It was concluded that the Ordinances were invalid for the City's failure to follow its own notice and procedural requirements. (*Id.* at 10). The state court further determined that it would be inequitable to allow

the City to apply the Ordinances to Corn and the Property given Corn's changes in position in reliance upon the C-1A zoning of the Property. (*Id.*)

The state court thus determined that the Ordinances were void and unenforceable as against Corn and the Property. (*Id.* at 14). The state court further determined that the City was obligated to approve the Site Plan upon Corn's correction of three minor deficiencies which the City had never afforded Corn the opportunity to correct. (*Id.* at 13). The State Court Final Judgment directed the City to approve the Site Plan and to issue a building permit for the Project. (*Id.* at 14-15).

The City appealed the State Court Final Judgment. *State Corn.* Pursuant to Fla.R.App.P.9.310, the appeal effected an automatic stay of the State Court Final Judgment, so that the Ordinances remained in force and effect, and the City was not obligated to approve the Site Plan during the pendency of the appeal. (*Corn II* at 586; R10-293, Farmer).

On February 16, 1983, the state appellate court affirmed the State Court Final Judgment. *State Corn.* The appellate court issued its mandate on March 4, 1983, at which time the appellate court's opinion became final. (First Findings of Fact at 1561.) As a result, the stay of the State Court Final Judgment was finally lifted so that the Ordinances became void and invalid as to the Property and the City was obligated to approve the Site Plan and issue a building permit for the Project.

After the appellate court issued its mandate, Corn communicated with the City regarding the steps necessary to finalize the Site Plan. (R9-128, Stephen Corn;

R12-595-96, Brady). During October, 1983, Corn submitted a revised Site Plan to the City for approval. (PX-56). The City refused to approve the revised Site Plan unless Corn platted the Property. (R9-128, Stephen Corn; R12-614, Brady). Platting would not have been required had the Site Plan been approved during July, 1977. (R9-129, Stephen Corn). Platting the Property would have required a reduction in the size of the Project, a dedication of land, payment of impact fees, and delay in the commencement of the Project. (R9-130, Stephen Corn).

On October 26, 1984, Corn filed a Motion to Enforce Final Judgment in the State Court Litigation. (PX-64A). Corn sought to have the state court enforce the State Court Final Judgment and require the City to unconditionally approve the Site Plan and issue Corn a building permit without having to plat the Property. (*Id.*).

On March 26, 1985, the state court entered an Order, finding in favor of Corn, concluding that Corn was not required to plat the Property, and directing the City to forthwith issue a building permit upon Corn's submission of appropriate plans and specifications. (PX-64B).

Corn did not thereafter resubmit the Site Plan, or any revision thereof to the City, having concluded that the changes in the area and growth of competition in the intervening eight years had rendered commencing the Project at that time economically unfeasible. (R9-182-84, Stephen Corn; PX-31, Feasibility Report). Corn has unsuccessfully attempted to sell the Property since 1985. (R9-187, Stephen Corn).

As of this date, the Property is still owned by Corn and remains vacant. (*Id.*).

STANDARD AND SCOPE OF REVIEW

Through this appeal Corn seeks review of certain legal issues and mixed questions of legal and factual issues which implicate constitutional rights. Such issues are subject to de novo review by the appellate court, without any deference afforded the trial court's determination of the issue. *E.g. In re: Georg*, 930 F.2d 1563, 1565 (11th Cir. 1990); *Tally-Ho, Inc. v. Coast Community College District*, 889 F.2d 1018, 1022 (11th Cir. 1990); *Greenbriar v. City of Alibaster*, 881 F.2d 1570, 1578 (11th Cir. 1989).

Further, certain of the findings of fact of the district court were clearly erroneous. A finding is clearly erroneous when it is not supported by the record or when, although there is evidence to support it, on the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Trust Company Bank v. MGM/UA Entertainment Company*, 772 F.2d 740, 746 (11th Cir. 1985). If a finding is directly contrary to the only testimony presented, it is properly considered to be clearly erroneous. *Trans-Orient Marine Corporation v. Star Trading and Marine, Inc.*, 925 F.2d 566, 571 (2d Cir. 1991). A trial court's finding is also clearly erroneous if it is contrary to the "right and justice of the case". *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1190 (5th Cir. 1979).

SUMMARY OF THE ARGUMENT

This appeal is the fifth appeal to this Court emanating from the City's refusal on July 12, 1977, to allow Corn to construct a mini-warehouse/shopping center project (the "Project"), on an 8½ acre parcel (the "Property").

Corn has been engaged in continuous litigation with the City since 1977 regarding, first, his right to build the Project, and then, his right to just compensation for the City's taking of his Property and his Project.

Corn prevailed at the first level. The state court concluded that the City had failed to follow its own procedures and wrongfully interfered with Corn's vested rights when the City wrongfully enacted ordinances rezoning Corn's Property from C1-A to B-3, eliminated warehouses as an authorized use in the C-1 zoning category, and imposed a one year moratorium on building permits and improperly rejected the site plan for the Project (the "Site Plan"). The state court declared the ordinances invalid as enacted and as applied and directed the City to approve the Site Plan and issue a building permit for the Project.

The City still wasn't willing to allow Corn to build the Project and appealed the State Court Final Judgment, which stayed the City's duty to approve the Site Plan. On March 4, 1983, the State Court Final Judgment was affirmed.

The City, still unwilling to allow Corn to build the Project, refused to approve a revised Site Plan, forcing Corn to return to court and on March 26, 1985, secure an Order compelling the City to approve the Site Plan.

To date, Corn has failed in federal court in his efforts to compel the City to compensate him for the taking of his Property and his Project through its wrongful refusal to approve his Site Plan between July, 1977 and March, 1985. Unfortunately, whether developers like Corn are

not viewed sympathetically or for other inexplicable reasons, to date, Corn has not recovered any compensation for his having established in state court that the City wrongfully confiscated his Property and his Project by improperly enforcing invalid ordinances and rejecting his Site Plan.

At this point, Corn's remaining claim is that the Property was unconstitutionally taken for approximately one year, between July 12, 1977 and July 4, 1978, while the city's ordinances establishing a moratorium were in effect. When this cause was last before this Court this matter was remanded to the district court for findings regarding whether there were economically viable uses of the Property while the moratorium was in effect. If there were no economically viable uses, the Property was temporarily taken and Corn is entitled to just compensation.

Significantly, in remanding for these findings this Court acknowledged that the City and Corn have proceeded in this litigation on the assumption that the moratorium applied to the Property, so that there were no economically viable uses of the Property during the moratorium. Indeed, the record evidence is uncontroverted that the City enacted the moratorium to prevent Corn from developing the Property, and that while the moratorium was in effect the City acted as if the moratorium applied to the Property. Further, for the past 20 years the City has expressly acknowledged in pleadings filed in this litigation that the moratorium applied to the Property and prevented all use of the Property. As recently as last year, in a Reply Brief filed in the United States

Supreme Court, the City clearly stated that the moratorium prevented construction on the Property through July 4, 1978, the expiration of the moratorium.

There is absolutely no evidence in the record whatever that the Moratorium did not apply to the Property. There is overwhelming evidence and judicial admissions by the City that the Moratorium prevented all use of the Property through July 4, 1978. All courts presiding over this case, including the district court, have expressly found that the Moratorium applied to the Property and denied Corn of all use of the Property.

The district court's factual findings to the contrary are clearly erroneous and erroneous as a matter of law.

Alternatively, if the record does not clearly establish that the district court's findings are clearly erroneous, the district court deprived Corn of his constitutional right of procedural due process by failing to afford Corn any opportunity to be heard and present evidence on remand regarding the applicability of the Moratorium to the Property. Corn never had an opportunity to litigate this issue at the original trial because, as this Court acknowledged, the City conceded that the Moratorium applied to the Property and denied Corn all use of the Property. In such event, this cause must be remanded with directions to the district court to hold an evidentiary hearing on the applicability of the Moratorium to the Property and whether Corn was denied all use of the Property during the Moratorium.

In either case, this cause must be remanded for the awarding of just compensation for the temporary taking of the Property.

This appeal provides Corn with one of his last opportunities to secure the just compensation which the United States Constitution, equity and fairness all dictate. This appeal affords this Court with, conceivably, its last opportunity to right this unconstitutional wrong.

ARGUMENT

I. The District Court's Finding That Corn Was Not Deprived of All Economically Viable Use of the Property During the Moratorium Was Clearly Erroneous.

a. Legal Standard for Constitutional Takings Claims.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> [N]or shall property be taken for public use, without just compensation.

The Fifth Amendment is applicable to municipalities pursuant to the Fourteenth Amendment of the United States Constitution, which provides:

> No state shall make or enforce any law which shall abridge the privileges of immunity through the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is clearly recognized that a municipality can effect a taking of a landowner's property through regulation, even though the regulation does not create a physical invasion or actual physical deprivation of property. *Lucas*

v. South Carolina Coastal Council, 505 U.S. 1003, 1115 (1992). A regulation which deprives a landowner of substantially all economically viable use of his property effects a compensable taking of the property. *Id.* This Court has designated such a takings claim as a "just compensation claim". *Eide v. Sarasota County*, 908 F.2d 716, 720-21 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). Further, the Supreme Court has held that a landowner is entitled to just compensation for the temporary regulatory taking of property for the period of time during which the regulation was in effect. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987). This Court has ordered just compensation for a temporary taking which lasted fourteen months. *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990).

Accordingly, if the Moratorium applied to the Property, thereby depriving Corn of all economically viable use of the Property for approximately one year, then Corn has established his just compensation claim and is entitled to recover compensation for the temporary taking of the Property.

b. This Court Remanded a Specific Factual Issue to the District Court.

In *Corn IV*, this Court vacated and remanded the Third Final Judgment in part, determining that the district court's factual findings regarding whether Corn was deprived of substantially all economically viable use of the Property during the Moratorium were insufficient for

effective appellate review. *Corn IV* at 1076. Specifically, this Court explained:

> The district court's factual findings were insufficient for effective appellate review. *We are unable to determine from the record whether the district court's conclusion that the [Property] could be put to economically viable use during the [M]oratorium is clearly erroneous. The parties proceed on the assumption that the [M]oratorium prohibited Corn from building anything on the [Property].* However, our review of the ordinances reveals that the [Property] was rezoned B-3 within a month after the [M]oratorium began, suggesting that the [Property] thereafter may not have been subject to the [M]oratorium. It may be that the district court based its conclusion on a finding that, during the [M]oratorium, Corn could use the [Property] for any use permitted by the B-3 zoning classification, but any such finding was not explicit. Hence, we remand for the court to make findings as to the economically viable uses of the [Property] during the [M]oratorium. (emphasis added). *Id.*

This Court thus recognized that if Corn was deprived of substantially all economically viable use of the Property for the approximate one year that the Moratorium was in effect, he would have established a just compensation claim of a temporary taking of his property during the Moratorium. The only matter remanded was the factual issue of whether Corn was denied all economically viable use of the Property during the Moratorium. *Corn IV* at 1076.

On remand, without affording Corn any opportunity to be heard, or to present evidence on this issue, the

district court found that Corn was not deprived of substantially all economically viable use of the Property during the Moratorium. (R7-284-11). The district court found that the Moratorium applied to C-1 zoned property and the Property was rezoned to a B-3 classification on July 12, 1977, so that the Moratorium did not apply to the Property and Corn could have developed the Property for any use allowable in the B-3 zoning classification after July 13, 1977. (*Id.*) This finding of fact was clearly erroneous.

c. The Record Undeniably Establishes that the Moratorium Applied to the Property, Thereby Depriving Corn of All Economically Viable Use of the Property During the Moratorium.

The issue of the applicability of the Moratorium was raised by this Court in *Corn IV* based upon the express wording of the Moratorium Ordinances, which on their faces apply to C-1 zoned property, and the fact that the Property was rezoned from C-1 to B-3 while the Moratorium was in effect. Notwithstanding the literal language of the Moratorium Ordinances and the rezoning of the Property, the *City* has always maintained and has never disputed that the Moratorium applied to the Property. The City has made numerous judicial admissions that the Moratorium deprived Corn of all use of the Property until July 4, 1978. Courts have made this finding.

Irrespective of the express language of the Moratorium Ordinances the record unequivocally establishes that the City applied the Moratorium Ordinances to the

Property and denied Corn all use of the Property for approximately one year.

(i). The Property Was Not Rezoned Until September 20, 1977.

Preliminarily, while Ordinance 549, which rezoned the Property from C-1A to B-3, was passed on first reading on July 12, 1977, it was not passed on second reading and accordingly did not become effective until September 20, 1977 (PX-78; R2-86-8, City Answer). The Property remained zoned C-1A through September 20, 1977, and the Moratorium clearly applied to the Property through this date. Corn could not develop the Property for any use between July 12, 1977 and September 20, 1977.

Accordingly, the district court's finding that Corn could have developed the Property at any time after July 13, 1977 for a use authorized under the B-3 zoning classification is clearly erroneous.

(ii). The City Intended For and Interpreted the Moratorium Ordinances to Apply to the Property.

While the Moratorium was in effect the City interpreted the Moratorium Ordinances as applying to the Property. The City intended for the Moratorium Ordinances to prohibit development of the Property through July 4, 1978, and interpreted and applied the Property Ordinances to accomplish this objective.

Ordinance 552, which first established the Moratorium, refers to two parcels of C-1 zoned property in

the City. (PX-79). One of these properties was the Property. (R11-509, Craft; R12-592, Brady). The purpose of Ordinance 552 was to establish a moratorium applicable to the Property to enable the Planning and Zoning Board to determine whether the Property should be rezoned. (R11-512, Craft). The City Attorney advised the City Council that the City could maintain the status quo regarding the Property by enacting a moratorium. (R12-595, Brady). Indeed, the City Attorney testified that the owner of the other C-1 property in the City "got caught in the broad sweep of Ordinance 552". (R12-612, Brady). The only record evidence is that the Moratorium was intended to apply to the Property.

Pursuant to Ordinance 552, the Planning and Zoning Board was directed to prepare a report for the two C-1 properties, regarding whether residentially zoned property contiguous to the C-1 zoned property suffers adverse effects. (PX-79). On December 23, 1977, the Planning and Zoning Board submitted this report to the City. (*Corn III* at 1384). Despite the fact that the Property was rezoned B-3 on September 20, 1977, this report discusses the Property and its impact on the adjacent residential area and proposes the rezoning of the Property to B-3. (*Id.*).

On January 10, 1978, the City enacted Ordinance 568 on an emergency basis, passing it on both first and second reading on this date, extending the original moratorium which had expired on January 6, 1978, through July 4, 1978. (PX-60). Ordinance 568 refers to the "properties currently zoned C-1 and/or C-1A." (*Id.*). The only property ever zoned C-1A in the City was the Property. (R1-47, Herman Corn; R12-594, Brady). Accordingly, Ordinance 568 purported to extend the Moratorium on

the Property, regardless of whether the Moratorium Ordinances strictly applied to the Property.

Indeed, in remanding this matter in *Corn IV* this court correctly discerned that the City has always maintained that the Moratorium applied to the Property, stating:

> The *parties* proceed on the assumption that the [M]oratorium prohibited Corn from building anything on the [Property]. (emphasis added). *Corn IV* at 1076.

The City has proceeded on this assumption because the City has always intended for, and interpreted the Moratorium Ordinances to apply to the Property. There is no evidence in this record whatsoever to the contrary.

The City's contemporaneous interpretation and application of the Moratorium Ordinances was binding on the district court. *See Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1545, *vacated for rehearing*, 42 F.3d 626 (11th Cir. 1994); *P.W. Ventures v. Nichols*, 533 So.2d 281, 283 (Fla. 1988) (contemporaneous construction of statute by agency accepted by court unless it is clearly unauthorized or erroneous). The district court's interpretation of the Moratorium Ordinances as not applying to the Property was clearly erroneous.

(iii). The City Has Made Binding Judicial Admissions That the Moratorium Applied to the Property.

Indeed, the City has steadfastly and repeatedly over the past 20 years acknowledged in its pleadings and at

trial that the Moratorium applied to the Property. Such judicial admissions are binding and remove from dispute that the Moratorium applied to the Property.

The City has *admitted* in positions taken and pleadings filed in this action in district court, this Court and the Supreme Court that the Moratorium applied to the Property.

In *Corn I*, this Court pointed out that the City acknowledged at oral argument that the Ordinances imposed a "ban on all building" by Corn. *Corn I* at 616 n.3.

In Proposed Findings of Fact and Conclusions of Law submitted by the City to the district court the City stated:

> *Subsequent to the expiration of the moratorium,* there was no legal impediment to any construction of any property which complied with the B-3 zoning classification. (emphasis added). (R5-200-6).

In the Status Report filed by the City in the district court the City again acknowledged that Corn was able to develop the Property for any use only once the Moratorium expired. (R7-266-8, 11).

In *Corn IV*, the City filed a Reply Brief. In its Statement of the Facts, the City described the enactment of the ordinances rezoning the Property and imposing the Moratorium. (City's Brief at 7). The City then stated:

> The effect of the legislation enacted by the City was to prevent construction on the subject property until July 4, 1978.

Indeed, on October 15, 1997, *after* this Court issued its opinion in *Corn IV*, and *after* the district court erroneously found that the Moratorium did not apply to the Property, the City filed a Reply Brief with the Supreme Court. In the City's Reply Brief the City again described the enactment of the Ordinances, including the Moratorium Ordinances, and then stated:

> *The effect of the legislation enacted by the City was to prevent construction on the subject property until July 4, 1978.* Thereafter, Corn was free to develop the Property in any manner consistent with the business zoning. (emphasis added). (Reply Brief at 5, App. 5).

The City thus unequivocally maintained, and indeed continues to maintain in its pleadings that the Moratorium applied to the Property and deprived Corn of all economically viable use of the Property from July 12, 1977, through July 4, 1978. Such statements are binding judicial admissions.

A judicial admission is a formal concession in the pleadings or a stipulation by a party or counsel which binds the party making the admission. *Keller v. United States*, 58 F.3d 1194, 1198 n. 8 (7th Cir. 1995). Judicial admissions are proof possessing the highest possible probative value. *Best Canvas Prod. & Supplies v. Ploof Truck Lines*, 713 F.2d 618, 621 (11th Cir. 1983). This Court has explained:

> Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them. *Id.*

Judicial admissions are deemed so conclusive that they act as substitutes for evidence, doing away with the need for evidence regarding the subject matter of the judicial admission. *State Farm, Mutual Automobile Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968), *citing* IX Wigmore, Evidence § 2588 (3d ed. 1940).

The City's judicial admissions that the Moratorium applied to the Property and deprived Corn of all use of the Property are incontrovertible and conclusively establish these facts. *See id.; Talavera v. School Board of Palm Beach County*, 129 F.3d 1214, 1217 (11th Cir. 1997) (judicial estoppel designed to prevent parties from making a mockery of justice by inconsistent pleadings); *Sun America Corp. v. SunLife Assurance Companies Canada*, 77 F.3d 1325, 1332 (11th Cir. 1996) (party estopped from maintaining contrary position from original factual position represented to appellate court). The district court's findings to the contrary are clearly erroneous and legally improper.

(iv). Courts Have Always Held That the Moratorium Applied to the Property.

Throughout the course of these proceedings courts presiding over this cause have all found that the Moratorium applied to the Property. The City has never contested this issue or disputed any such findings.

When Corn first sued the City in 1977 in state court, Corn sought a determination that the Ordinances, including the Moratorium Ordinances were invalid and unenforceable. The City never contended in the State Court Litigation that the Moratorium Ordinance did not apply to the Property. The final judgment entered in the State

Court Litigation referred to Ordinance 552 as "an ordinance imposing a building moratorium on [Corn's] property" and was invalidated as applied to the Property. (State Court Final Judgment at 9). In affirming the State Court Final Judgment the state appellate court referred to Ordinance 552 as "imposing a building moratorium on [Corn's] property". *State Corn* at 241.

In *Corn I*, this Court stated:

> Since the subject ordinances called for a complete moratorium on Corn's development of his property any request for a variance would plainly have been futile. *Corn I* at 1516.

In *Corn II*, this Court explained that the dispute involved three ordinances, including the Moratorium Ordinance, and stated that the Moratorium Ordinance "imposed a moratorium on further development of Corn's property". *Corn II* at 586.

Significantly, after the trial of this cause, in the First Findings of Fact the district court found that the Moratorium applied to the Property and prevented all use of the Property. Specifically, with respect to Corn's loss of all use of the Property, the district court stated:

> . . . This Court agrees that *a total ban lasted for nearly a full year. . . . The record establishes that after July 4, 1978, when the building moratorium expired* by its own terms, there was no legal impediment to constructing any project that complied with the B-3 zoning classification, including the exact shopping center described in the Site Plan. (emphasis added). (First Findings of Fact at 1572.)

Based on this finding, the district court awarded Corn compensation for the loss of all use of the Property from July 12, 1977, through July 4, 1978. *Id.* at 1573.

Further, in denying Corn's Motion to Amend the First Findings of Fact, the district court confirmed its finding that during the Moratorium Corn was prevented from all development of the Property and that Corn first regained his right to develop the Property in any respect upon the expiration of the Moratorium. (R6-216-3).

While in *Corn III* this Court determined that certain of the district court's findings were clearly erroneous, this Court did not disturb the district court's finding that the Moratorium applied to the Property and prevented Corn from developing the Property in any respect.

In the Second Findings of Fact, issued after remand pursuant to *Corn III*, the district court again found that the Moratorium applied to the Property and that it was not until July 4, 1978, that Corn "regained all his sticks in the bundles of rights commonly characterized as property" and was able to develop the Property for any use. (R7-273-8, second Findings of Fact at 8.)

Only upon remand after *Corn IV*, and without affording Corn any opportunity to be heard, the district court inexplicably and erroneously changed its previous findings of fact and concluded that the Moratorium did not apply to the Property and that Corn could have developed the Property at any time after July 12, 1977, for B-3 uses. (R7-284-11). This finding of fact ignores and is inconsistent with the evidence in the record, conflicts with the City's own interpretation of the Moratorium

Ordinances and the City's judicial admissions that the Moratorium applied to the Property.

Regardless of the literal provisions of the Moratorium Ordinances, the City's expressed intent and conduct during the Moratorium and stated legal position over the years compelled the district court to have maintained its original findings of fact and conclude that the Moratorium applied to the Property, thereby depriving Corn of all economically viable use of the Property during the Moratorium.

The trial court's ruling to the contrary was clearly erroneous and must be reversed.

II. Corn Was Denied Due Process of Law Because He Was Not Given the Opportunity to be Heard or Present Evidence on Remand.

Alternatively, if the record does not clearly establish that the Moratorium applied to the Property and denied Corn all economically viable use of the Property, then this cause must be remanded with instructions for the district court to hold an evidentiary hearing on this issue. The district court's failure to afford Corn any opportunity to be heard on this issue upon remand from *Corn IV*, deprived Corn of his constitutional right to due process of law.

In remanding this cause in *Corn IV*, this Court acknowledged that Corn and the City had proceeded on the assumption that the Moratorium prohibited Corn from building anything on the Property. *Corn IV* at 3635.

This is a clear recognition that the "issue" of the applicability of the Moratorium to the Property had never theretofore been in dispute between the parties, and accordingly had never been litigated. The City has not contested whether the Moratorium applied to the Property. Indeed, to the contrary, the City has repeatedly conceded that the Moratorium applied to the Property. *See* discussion at 22-24, *supra*. Corn detrimentally and justifiably relied thereon, and did not present any evidence at trial to establish that the Moratorium applied, or was applied to the Property. There was no reason whatever to present any such evidence or argument given the City's effective stipulation that the Moratorium Ordinances applied to the Property. *See Best Canvas*, 713 F.2d at 621 (party bound by judicial admissions).

Since this factual issue has been first raised in this litigation by this Court in *Corn IV*, and there was a dispute regarding the material facts relating thereto, Corn was entitled to be heard and present evidence on this matter on remand. *See Landmark Land Company, Inc. v. OTS*, 990 F.2d 807, 812 (5th Cir. 1993). It is a denial of procedural due process to fail to afford Corn an opportunity to be heard or present evidence on an issue which has not previously been the subject of the litigation. *See Armstrong v. Monzo*, 380 U.S. 545, 552 (1965); *duPont v. Southern Nat. Bank of Houston, Tex.*, 771 F.2d 874, 880 (5th Cir. 1985) (due process entitles a litigant to be heard on each issue in litigation).

On remand the district court was presented by this Court with the task of making findings on a factual issue which had not previously been contested or at issues in the litigation. It is unfair and unconstitutional for the

district court to have made findings on this new issue without affording Corn any opportunity to be heard or to present evidence thereon.

If it is not clear from the record that the district court's findings that the Moratorium did not apply to the Property, and that Corn was not deprived of all economically viable use of the Property during the Moratorium were clearly erroneous, then this Court must remand this cause to the district court with directions to hold an evidentiary hearing on these issues.

CONCLUSION

The district court's findings of fact that at any time after July 13, 1977, Corn could develop the Property for B-3 uses, so that he was not deprived of all economically viable use of the Property during the Moratorium are clearly erroneous.

Corn requests that this Court reverse the Third Findings of Fact and Third Final Judgment and hold that the Moratorium applied, or was applied to Corn's Property, thereby depriving Corn of all economically viable use of the Property through July 4, 1978. This cause must be remanded to the district court for a determination and award of the just compensation to which Corn is entitled for the temporary taking of the Property from July 12, 1977, through July 4, 1978.

Alternatively, Corn requests this Court to remand this cause to the district court for an evidentiary hearing regarding whether the Moratorium applied, or was applied to Corn's Property, thereby depriving Corn of all

economically viable use of the Property from July 12, 1977, through July 4, 1978, and if so, setting the just compensation to which Corn is entitled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this ___ day of March, 1998 to Michael C. Mattson, Esq., Cooney, Haliczer, Mattson, Lance, Blackburn, Pettis & Richards, P.A., 301 E. Las Olas Blvd., Fort Lauderdale, FL 33302.

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